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Supreme Court of the United States

OCTOBER TERM 1963

No. 1214

EDWARD SCHENKER and DAVID SCHENKER, on behalf of themselves and all other Stockholders of the Cumulative Preferred Stock without par value $3.50 Series and Cumulative Preferred Stock without par value $4.50 Series of E. I. du Pont de Nemours & Company Incorporated,

Petitioners,

vs.

E. I. DU PONT DE NEMOURS & COMPANY INCORPORATED,

Respondent,

and

WALTER S. CARPENTER, JR., WALTER J. BEADLE, DONALDSON BROWN, et al.,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

EDWARD SCHENKER and DAVID SCHENKER, on behalf of themselves and all other Stockholders of the Cumulative Preferred Stock without par value $3.50 Series and Cumulative Preferred Stock without par value $4.50 Series of E. I. du Pont de Nemours & Company Incorporated,

Petitioners,

vs.

E. I. DU PONT DE NEMOURS & COMPANY INCORPORATED,

Respondent,

and

WALTER S. CARPENTER, JR., WALTER J. BEADLE, DONALDSON BROWN, et al.,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT[1]

This is a petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, entered March 19, 1964, affirming a judgment of the United States District Court for the Southern District of New York, entered June 27, 1963, dismissing petitioners' complaint against E. I. du Pont de Nemours & Company Incorporated, a Delaware corporation ("du Pont" or "Company"), in a class action brought on behalf of du Pont preferred holders, 3.50 Series and 4.50 Series (jointly designated "Preferred")[2] for an

1. References to the record and appendix are abbreviated as follows: "A"—Joint Appendix; "R"—Record on Appeal; "Ex."—Exhibits to the Stipulation of Facts (other than exhibits printed in the Joint Appendix); "Compl. Ex."—Exhibit to the Complaint; and "Ans. Ex."—Exhibit to the Answer.

2. Petitioner Edward Schenker owns 1,000 shares of the 3.50 Preferred, with a cost and market value of $80,000, part acquired in October 1957; and petitioner David Schenker owns 500 such shares with a cost and market value of $40,000, part acquired in November 1960 (A34, 84).

injunction restraining du Pont from effecting as the sole method of divestiture a distribution ("Distribution")[3] of any part of the 63 million shares of General Motors Corporation ("Motors") common stock ("Motors Common") owned by du Pont[4] to the holders of du Pont common stock $5 par value ("du Pont Common") pursuant to a resolution of the Board of Directors of du Pont ("Board") and public announcements on May 31 1962 on the basis of 1.37 shares of Motors Common for each share of du Pont Common ("Distribution Resolution"); or for a money judgment for the voluntary liquidation value of the Preferred upon the ground that the Distribution constitutes a voluntary liquidation of du Pont under its charter[5] (R1-105; A58-59). Respondent's answer is in effect a denial of petitioners' causes of action (R382-428). The trial of this action was held on a written Stipulation of Facts ("Stipulation")[6] before Judge Edmund L. Palmieri ("Trial Court"), without oral testimony (R54; A5, 38-95).

The market value of the Motors Common on the date of the Distribution Resolution was $50 per share or an aggregate of $3,150,000,000 ("$3.15 Billion")[7] or 65% of

3. Unless otherwise indicated, the term "Distribution" shall mean such distribution of all or substantially all of the 63 million shares of Motors Common owned by du Pont to the du Pont Common holders.

4. In 1918 and 1919, du Pont invested $50 Million in Motors Common which together with the acquisition in 1955, while the divestiture suit was pending, of one million shares for $75 Million from general corporate funds resulted, by reason of a subsequent split, in 63 million shares or 22% of the total Motors Common outstanding (A54, 55-56, 75).

5. Petitioners also asserted a derivative cause of action against the individual defendants who have not been served. The Trial Court deemed this cause abandoned and accordingly dismissed it (A6).

6. The Stipulation was introduced as Court's Exhibit 1 and the exhibits to the Stipulation were introduced as Court's Exhibits 2A, 2B, 2C, 4, 5 and 6 and as defendant's Exhibits A and B. For the sake of uniformity and clarity, all exhibits to the Stipulation will be designated in the petition by the letter designation accorded the exhibit in the Stipulation.

7. Hereafter, any reference to the market value of Motors Common will be on this basis of $50 per share unless otherwise indicated.

du Pont's net worth and 68% of the Common holders' investment[8] including the members of the du Pont Family who owned 30% of the du Pont Common outstanding and controlled 40% of the total du Pont votes ("Family" or "Dominant Group") (A37, 55-56). The present market price is about $87 per share or a total of about $5.5 Billion for the 63 million shares.[9]

Petitioners on June 30, 1962 moved for a preliminary injunction to restrain an initial distribution on July 9, 1962 of 23 million shares with a then market value of $1.15 Billion. The motion was denied by Judge Palmieri (reported in part 1962 Trade Cas. par. 70,389) and was affirmed by the Court of Appeals (304 F. 2d 880, 2d Cir. 1962) (R137-152; 108-193; 380-381). On or about January 9, 1964, while the appeal from the judgment was pending in the Court of Appeals, du Pont effected a distribution of an additional 17 million shares of Motors Common with a then market value of $88 per share for an aggregate of $1.5 Billion.[10] There remains 23 million shares with a present market value of $87 per share for an aggregate of $2 Billion to be distributed prior to February 28, 1965.

Opinions Below

The opinion of the Court of Appeals (App. A, *infra*, pp. A1-4) reported at 329 F. 2d 77 (1964)). The opinion of the District Court is not reported and is included in the Joint Appendix for the Court of Appeals, pp. 4-31 inclusive submitted with this petition.

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8. All references in this brief to du Pont's financial data are taken from the Company's financial statements for the calendar year 1961, the last accounting period prior to the Distribution, adjusted by petitioners to include the Motors Common at the market value of $3.15 Billion, unless otherwise stated. The Motors Common was carried on the books of the Company on December 31, 1961 at $1.222 Billion based on an annual revaluation to an amount which closely corresponds to the equity indicated by the Consolidated Balance Sheet of Motors at December 31 of the preceding year. The book net worth of du Pont on December 31, 1961 was $2.944 Billion (Ex. G).

9. The New York Times, June 2, 1964, New York Stock Exchange quotations, financial page.

10. The New York Times, January 9, 1964.

Jurisdiction

The judgment of the Court of Appeals was made and entered on March 19, 1964 (App. B, *infra*, p. B1). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

Questions Presented

(1) Did the Divestiture Decree proposed by du Pont, pursuant to the mandate of this Court, and entered in the proceeding in equity under the Clayton Act, giving du Pont the power to select the methods of divestiture of its Motors Common, impose upon the Board and Dominant Group the equitable obligations of a court of equity and as directors and controlling stockholders the fiduciary duty to select a plan of divestiture which would be fair to the Preferred holders?

(2) Did the irreconcilable conflict between the interests of the Board and Dominant Group with the interests of the Preferred in connection with the selection of the plan of divestiture pursuant to the decree in the equity action and as directors and controlling stockholders disqualify the Board and Dominant Group from formulating such plan unless the conflict of interest between them and the public Common holders and the Preferred was first eliminated?

(3) Did the plan of divestiture solely by Distribution, selected by du Pont and which deprived the Preferred of a major portion of its asset and income coverage and conferred most substantial benefits upon the Board and Dominant Group; conform with the equitable obligations imposed upon the Board and Dominant Group by the Clayton Act and with their fiduciary duties, as directors and controlling stockholders, to the Preferred; and did the plan meet the test of fairness required by equity and good conscience under the circumstances of this case?

(4) Was the absolute power claimed by the Board under the Preferred agreement to declare any Distribution of the Motors Common to the du Pont Common holders, provided the capital of du Pont was not

impaired, a power in trust subject to equitable limitations and the fiduciary duty of the directors and the Dominant Group to treat the Preferred holders fairly and not to subordinate their interests to this Dominant Group, particularly under the circumstances of the instant case?

(5) Did respondent's position that the relationship between the Preferred and du Pont, its controlling stockholders and public Common holders were defined solely by the Preferred contract, that the Preferred had no rights or interest in the Motors Common and could not sustain any injury by the Distribution and, therefore, were owed no fiduciary obligations by the Board and Dominant Group with respect to such Motors Common disqualify the Board and Dominant Group from formulating the plan of divestiture?

(6) Was a duty, equitable or legal, imposed upon the Board and Dominant Group to accord fair play and equitable treatment to the Preferred by reason of the emphasis in the Prospectuses upon the Motors Common upon which the Preferred was sold to the public; the commencement of the Divestiture Suit shortly after such sales; the illegality of du Pont ownership of the Motors Common at the time of the sale of the Preferred to the public; the re-purchase by du Pont of the Preferred shares from the du Pont Pension Fund while the Divestiture Suit was pending without a comparable offer to the public Preferred holders; the purchase of an additional substantial amount of Motors Common while such Divestiture Suit was pending; the activities of the du Pont directors and Dominant Group in connection with the sponsoring of the Preferential Tax Law; the representations to various Preferred holders with respect to the protection of their interest by the Company in connection with divestiture; and the submission by du Pont to the District Court of the decree granting du Pont the right to select the method of divestiture?

(8). Did the manifold equitable, fiduciary and legal obligations impose upon the Board and Dominant Group by all the facts and circumstances of this case, particularly in view of the Distribution which has already been effected of 40 of the 63 million shares of Motors Common, require that the Preferred holders be rendered whole?

(8) Did the Distribution constitute a voluntary liquidation of the Company under the terms of its charter which entitle the Preferred holders to the liquidating value of their stock?

The Statutes Involved

28 U. S. C. Sec. 1652:

> "The laws of the several states except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

Sec. 15 of the Clayton Act (U. S. C., Title 15, Sec. 25):

> "The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. . . ."

Statement of the Case

The basis of Federal jurisdiction of this action is diversity of citizenship under 28 U.S.C. Sec. 1332(a).

The instant action arises out of the proceedings in equity filed by the Department of Justice on June 30, 1949 ("Divestiture Suit"), in the United States District Court for the Northern District of Illinois ("District Court") against du Pont, Motors and Christiana Securities Company ("Christiana"), to prevent and restrain the violation of the Clayton Act, Sec. 7, by reason of the acquisition and retention by du Pont of 63 million shares of Motors Common. This Court in *U. S.* v. *E. I.*

du Pont de Nemours & Company, 366 U. S. 316 (May, 1961), ("Divestiture Opinion") had issued a mandate directing du Pont divest itself of all the 63 million Motors Common within 10 years and remanded the case to the District Court to enter judgment directing such divestiture. The final decree proposed by du Pont on such remand was entered by Judge LaBuy on March 6, 1962, as amended April 26, 1962 ("Divestiture Decree")[11] and directed the Company to divest itself within 34 months of all of its Motors Common "by distributing such stock to its stockholders (including non *pro rata* distributions in redemption of its own stock) or in the alternative, by disposing of all such stock by such methods or combination of methods as it may select * * *" (A8-11, 60-68; Comp. Ex. C; Exs. K and O).[12] The decree contained no definitive plan or designation of the methods or combination of methods of divestiture nor did it provide for the approval by the District Court of such methods selected by du Pont (Comp. Ex. C; Ex. K).

The Divestiture Decree, in essence, delegated the selection of the methods of divestiture to the Board and the Family, who were in an irreconcilable conflict with the Preferred and who dominated the Board and

11. Judge LaBuy had dismissed the original anti-trust complaint (*U. S.* v. *E. I. du Pont*, 126 F. Supp. 235 (Dec., 1954)), and on appeal this Court (*U. S.* v. *E. I. du Pont*, 353 U. S. 586 (June, 1957)) held that the acquisition and retention of the Motors Common by du Pont violated the Clayton Act, Sec. 7, and remanded the case to the District Court with direction to conduct further hearings as to the relief appropriate in the premises. The District Court denied divestiture and permitted du Pont to retain all the Motors Common but devoid of voting rights *U. S.* v. *E. I. du Pont*, 177 F. Supp. 1 (Oct. 1959). Upon appeal, this court again reversed and issued the mandate directing divestiture (A60-65).

12. The decree directed Christiana, an investment company which owned 30% of du Pont Common, to divest itself of any Motors Common it owned or might receive on the Distribution within 3 years and directed the members of the Family and Family Trusts to divest themselves of any such Motors Common received on Distribution within a period of 10 years. Christiana in 1915 acquired almost all of the 30% of the total du Pont Common from the Family (A66-69; 42).

management of du Pont by reason, among other things, of the control of 40% of the total du Pont votes.[13] The remainder of the du Pont Common was widely dispersed among many thousands of owners (A56-57; Ex. h). The Preferred never had the right to vote and never participated in the management (A46). All the acts which are the basis of this litigation were, therefore, the acts of the Board and management selected and dominated by the Family. The Family owns 30% of du Pont Common or 14.7 million shares, of which they own individually 700,000 shares directly, 4.46 million beneficially through Family Trusts, and indirectly 9.4 million shares through Christiana. This ownership gave them an interest in the Distribution of about 20 million shares of Motors Common with a market value of $1 Billion while their interest in the Preferred was $2 Million, or a ratio of 500 to 1 (A56-58; Comp. Ex. A). The average cost of these du Pont shares to the Family was $12 (A72). The aggregate holdings of the 29 du Pont directors of the Preferred were extremely small in comparison to their holdings of Common (Comp. Ex. A; A13).

During 1959 through 1961, du Pont made repeated efforts and expended substantial funds to obtain the passage of legislation in Congress which would give special tax treatment to distributions made pursuant to divestiture decrees. The Company urged all its stockholders, Preferred and Common, to write to their Congressmen regarding this legislation and represented to some individual Preferred holders who wrote that a Distribution would adversely affect the Preferred that their interests would be protected. Du Pont had advised Congress, as well as its stockholders, that if the new tax law were not adopted, the Company would not distribute any part of the Motors Common but would adopt

13. The 40% control consisted of 10% through direct and beneficial ownership and 30% by reason of the Family's ownership of 70% of Christiana which owned 30% of du Pont (A56-58; 6-7).

other methods to effect divestiture. A tax bill was enacted on February 2, 1962 as Public Law 87-403 ("Preferential Tax Law"), after the issuance of the mandate of this Court and shortly prior to the entry on March 1, 1962 of the Divestiture Decree. This law treats distributions as a return of capital subject only to a 25% capital gains tax to non-corporate stockholders instead of at normal income tax rates under the prior existing law (A71-78; Ex. FF, 1-26a; Ex. Q, pp. 78-80).

Although other methods of divestiture not harmful to the Preferred were available, the Board and Family selected Distribution as the sole method which resulted in a tax saving to the Family of $220 Million on Distribution[14] and $6 Million every year thereafter by the elimination of intercorporate dividend taxes and also enabled them to diversify their personal security investments with the proceeds of their sales of the Motors Common. The savings in taxes to all non-corporate du Pont Common holders including the Family is about $575 Million to $825 Million[15] (plus savings every year thereafter by the elimination of intercorporate dividend taxes) (Ex. P, pp. 70, 335). By contrast, the Distribution results in a drastic diminution of the Preferred's liquid asset coverage by $3.15 Billion or 65%, and by $145 Million income coverage annually or 35% loss of product diversification inherent in the Motors Common, with resultant injury in the investment value and decline in the market price of the $238 Million of Preferred outstanding.

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14. The Family will receive on the Distribution 7.26 million shares of Motors Common (as non-corporate stockholders) having a market value of $363 Million, which was taxable to the Family at normal tax rates of 82% or a tax of $295 Million under the prior tax law, whereas under the new tax law, it is subject only to a capital gains tax of $75 Million on the $300 Million excess of the market value over their cost, a difference in taxes of $220 Million (A72-73, Ex. J).

15. The total taxes under the prior tax law on a Distribution to non-corporate du Pont stockholders would be $750 Million to $1 Billion and under the Preferential Tax Law $165 Million according to du Pont (Ex. P, p. 379; Ex. Q, p. 81).

This basic conflict between the interests of the Common holders and the Family with the interests of the Preferred was created by the sponsorship by du Pont of the Preferential Tax Law and by its proposal of the Divestiture Decree delegating the power to select the method of divestiture to the Board and Dominant Group. The Company, during the divestiture litigation, asserted to the courts, Congress and its stockholders that a Distribution under the then prevailing laws taxing distributions to non-corporate stockholders as ordinary income was "unthinkable" and "prohibitive" because the taxes to them would amount to $750 Million to $1 Billion, and losses in the market value of the Motors and du Pont Common would be $4 to $6 Billion and stated: "* * * clearly rules out such a distribution when other methods of divestiture are available." The Government vigorously denied these claims of alleged disastrous effect upon the market value and asserted the market losses, if any, and drastic tax consequences could be avoided by use of a plan of divestiture. This plan encompassed offers of exchange of Motors Common for du Pont Preferred and Common stocks, payment of part of the du Pont cash dividends with Motors Common and the sale to the public of the balance of Motor Common by the Company ("Flexible Plan"). Du Pont strongly objected to this Flexible Plan in this Court stating that it was completely unfeasible and there would still be the same large losses in market value and confiscatory tax consequences (A64; Ex. P, pp. 66, 389-393; Ex. Q pp. 77, 80).

Du Pont asserted it placed great reliance on the opinion of Frank A. Petito ("Petito"), a partner of Morgan Stanley & Co. ("Morgan"), bankers for the Company and the Family, that the Preferred after the Distribution "would still warrant inclusion of these stocks among the highest quality preferred stocks" based on a comparison of the Preferred with the preferreds of 29 other industrial companies ("29 Preferreds") (A79, 121-127). A chart comparing the financial characteristics of the Preferred

with these 29 Preferreds ("Chart of 29 Preferreds") establishes conclusively that Petito's conclusion is erroneous.[16]

This chart shows, as a result of the Distribution, that:

(a) The net tangible asset coverage per share of Preferred becomes lower than every one of the 29 Preferreds including one rated BBB; but prior to the Distribution, it was lower than 13;

(b) The net cash assets[17] per share becomes lower than 24 of the 29 whereas formerly it was lower than 6;

(c) The earnings per share becomes lower than 21 of the 29 but before the Distribution it was lower than 16; and

(d) The ratio of the Preferred to total capitalization becomes higher than all the 29 whereas formerly it was higher than 13.

An examination of this chart reveals that, in most of the instances in which the comparison with the other preferreds is unfavorable to du Pont, it is unfavorable by a substantial amount.

The extent of the injury to the Preferred is further demonstrated by adding all of the remaining 19 industrial preferreds rated AA[18] included in Standard's Guide for 1962 to the 29 Preferreds considered by Petito making

16. This chart captioned "Comparison of Financial Characteristics of du Pont Preferred with the 29 Preferreds Considered by Petito" is annexed to this petition as "Schedule A". These 29 Preferreds were not chosen by petitioners but were selected by Petito to reach his conclusion. They include 23 industrial preferreds included in Standard & Poor's ("Standard") and Moody's Indices of Average Yields ("Average Indices"), encompassing 7 preferreds rated AAA; 9 rated AA, 6 rated A and one rated BBB (A125-126); and in addition, the remaining 6 industrial preferreds rated AAA by Standard. All the statistical factors in this chart were created by Moody's 1962 Volume except "Net Current Assets Less All Liabilities" which was created by petitioners and derived from statistics contained in Moody's.

All lettered ratings are Standard's ratings.

17. Consisting of current assets including Motors Common less all liabilities including long-term debt.

18. See chart captioned "Comparison of Financial Characteristics of du Pont Preferred with the Remaining 19 Preferreds Rated AA", annexed to this petition as "Schedule B".

a total of 48 preferreds ("48 Preferreds"). After the Distribution, the net tangible asset coverage per share of the Preferred becomes lower than all of these 48 Preferreds except one;[19] and its net cash assets is lower than 33; its income coverage lower than 34; and its percentage of Preferred to total capitalization is greater than 47 of the 48.[20] This in face of the fact that 35 of the 48 Preferreds are rated lower than AAA.

This injury to the Preferred was conceded by R. Russell Pippin, Treasurer of du Pont ("Pippin"), in a report dated March 13, 1962 to the Finance Committee of du Pont ("Pippin Report"), after the final decree was entered on March 1, 1962 which admits to an "• • • adverse impact of GM distributions on preferred stockholders • • •" (A100). Similarly, Andrew J. Dallstream, Esq. ("Dallstream"), first designated by the District Court guardian of the du Pont minors and then Amicus Curiae with respect to the du Pont stockholders in the Divestiture Suit ("Amicus"), in a report dated August 1948 ("Amicus Report"), stated:

> (a) that the emphasis on du Pont's holding of Motors Common in the prospectuses used upon the sale of the Preferred to the public aided du Pont in selling the Preferred at "low dividend rates and other very favorable terms"; and (b) that about 13 million shares of Motors Common or, if sold, the proceeds of the sale, be retained by the Company in fairness to the Preferred as a cushion for their investment or possible exchanges with the Preferred; and (c) that the assets represented by these shares "will afford a liquidity of capital and a

19. The coverage of Owens-Illinois Glass Co. preferred is lower per share than the Preferred but it is convertible into the common stock of Owens Corning Fiberglass Corp. and, therefore, also has the protection of the assets of that company and the solvency of two companies instead of one.

20. The Warner Lambert Pharmaceutical Co. convertible preferred was issued in October 1962 on the merger with the American Chicle Co. There are, therefore, no figures available as of December 31, 1961 for this preferred, although figures as at December 31, 1962 indicate the coverage is lower than the Preferred. We have not included this company in our tabulation.

certainty of earnings coverage desirable to maintain to a reasonable degree the market value and high rating which the preferred stocks have historically enjoyed, and which they ought—in all fairness—to be entitled to continue to enjoy" (Ex. N, pp. 15, 111-115).

The Board and the Dominant Group made no provision for replacing any part of this security or diversification or for mitigating the loss to the Preferred holders occasioned by the downgrading of their investment by the Distribution.

An aggregate of 2,388,850 shares of Preferred, cumulative and non-convertible, is outstanding with a stated value of $100 per share, for a total stated value of $238,885,000. An aggregate of 1.89 million shares of 4.50 Preferred was issued in 1939 in exchange for du Pont debenture stocks. The remainder of the 1,688,850 shares of 4.50 Preferred and 700,000 shares of 3.50 Preferred was sold to the public in 1937 and 1947 respectively, after registration with the Securities and Exchange Commission ("Securities Commission") upon prospectuses ("Prospectuses") which, according to Pippin, gave greater prominence to the du Pont ownership of the Motors Common than required by the Securities Commission's rules (A43-46; 49-51; Ex. B, p. 8; Ex. F, pp. 9-10). Pippin and the Amicus emphasized this prominence would lead to a reasonable expectation such as would have been taken into consideration by the ordinary prudent purchaser, that the history of du Pont and its established policies were such that this asset, with its high earning power, would be available for the protection and the maintenance of value and marketability of their investment (A99-100; Ex. N, pp. 111-115).

The Company claimed it relied on the opinion of Saul A. Smerling ("Smerling"), a Vice-President of Standard, that the AAA rating for the Preferred would be continued after the Distribution. However, it was admitted in the Stipulation that the ratings are merely a matter of judgment, which have been revised upwards and down-

wards, and in instances companies considered of high investment quality have gone into bankruptcy (Ex. U; A80-81).

In 1947, at the time of the sale of the 3.50 Preferred to the public, the du Pont 1942 Pension Fund bought $30 Million of the $3.50 Preferred which stock was re-purchased by the Company in 1954 while the Divestiture Suit was pending without a comparable offer to the public Preferred holders (A51). In 1948, about one year after the sale of $70 Million of the 3.50 Preferred to the public, a Grand Jury investigated the possible violation of the anti-trust laws by du Pont and Motors but no indictment was returned, and in 1949 the Divestiture Suit was started (A60).

ARGUMENT

POINT ONE

The Board of Directors and Dominant Group who controlled the Management of du Pont owed to the Preferred the strictest fiduciary duties of fair play and good faith not to subordinate the interests of the Preferred to their own interests.

(A) The Control and Domination of the Board and Management by the Dominant Group.

The Family with its control of not less than 40% of the votes of du Pont from its inception dominated and controlled the Company and its management (A56-57). See *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 92 Fed. (2d) 580 (C.A. 2), aff'd 303 U. S. 419 (a presumption of control by ownership of 10% of the voting stock was not unreasonable); *Morgan Stanley & Co.* v. *Securities and Exchange Commission*, 126 F. 2d 325; *Gratz* v. *Claughton*, 187 F. (2d) 46 (C.A. 2), cert. denied 341 U. S. 920. The Family block of du Pont Common has been a unified holding locked up in Christiana and in various Family Trusts, while the remainder of the outstanding Common was actively traded on stock exchanges and was widely dispersed among thousands of individuals unorganized and constantly changing. As of December

31, 1960 about 173,000 individuals were record owners of 1 to 100 shares, or 82% of the total individual holders (A56-57; 84, 95; Ex. J). See *U. S.* v. *Union Pacific R.R. Co.*, 226 U. S. 61 at 95-96; *Natural Gas Pipeline Co.* v. *Slattery*, 302 U. S. 300, at 307, 308; *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125.

The five presidents of du Pont since its inception have been blood relatives of or otherwise related to the Family. Of the 29 directors of du Pont, 10 were members of the Family and the remainder had some executive, administrative or employee status with the Company (except 2 who were retired employees) which entitled them to salaries and made them eligible for stock options, bonuses and pensions after specified years of service, all of which emoluments were dependent upon the decision of the Family. No director was independent of the management. A marked interlocking of directors and officers between Christiana and du Pont has always existed. The du Pont stock owned by Christiana has invariably been voted in favor of the proposals of the du Pont management (A57-58; Comp. Ex. A, pp. 5-6). In addition, the Family through its control of the management controlled the proxy machinery.[21] Under Sec. 2 (9) of The Investment Company Act of 1940 (U. S. C. 80a-2 (9)), under which Christiana is registered, the Family which owns 70% of Christiana which owns 30% of du Pont is presumed to control du Pont (A56-57). Judge LaBuy in the du Pont decision in 126 F. Supp. 235, 239-240 and the Trial Court both concluded from the facts that the control of the management of du Pont by the Family was indicated (A12).[22]

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21. Berle, "Control" in Corporate Law, 58 Col. L. Rev. 1213 (1958).

22. The Family referred to in both these opinions is co-extensive with the Family used by petitioners and included members of the du Pont Family who owned du Pont stock including the numerous members who were required to sign the Divestiture Decree (Comp. Ex. C; Ex. K).

(B) The High Fiduciary Duty Owed by the Board and the Dominant Group to the Preferred.

The Board and the Family as controlling stockholders owed the Preferred holders the strictest equitable and fiduciary duty of inherent fairness and good faith not to subordinate the interest of the Preferred holders to their own interests and not to violate the precepts against serving the interests of two masters—their own interests and the interests of the Preferred holders—particularly in the absence of arm's length bargaining. Courts of equity in all jurisdictions have zealously guarded this obligation and enforced strict compliance with this duty. See *Pepper* v. *Litton*, 308 U. S. 295; *Southern Pacific Company* v. *Bogert*, 250 U. S. 483; and *Guth* v. *Loft, Inc.*, 23 Del. Ch. 255. The precept as old as the holy writ that a man cannot serve two masters has been unequivocally asserted in *U. S.* v. *Mississippi Valley Co.*, 346 U. S. 520, at 549: "* * * a maxim which is especially pertinent if one of the masters happens to be economic self interest." See also Stone in "The Public Influence of the Bar," 48 Harvard L. Rev. 1, pp. 8-9. We shall demonstrate that the Board and the Dominant Group not only failed to observe but did not consider that they had a fiduciary duty to the Preferred.

(C) The Conflict of Interest Created by du Pont in Obtaining the Preferential Tax Law.

Prior to the mandate of this Court directing divestiture, no conflict of interest existed between the Common and Preferred holders. Throughout the divestiture litigation, the Board and the Dominant Group fought to retain the 63 million shares of Motors Common even devoid of voting rights, as in the best interest of the Company and its stockholders. The interest of the Preferred also dictated such retention. But for the violation of the Clayton Act, the Motors Common would have remained in the Company to the mutual benefit of all the stockholders. With the issuance of the mandate, a determination had to be made by the District Court as to the method of

divestiture to be employed. The Company made it clear to all its stockholders and the Congress that absent the Preferential Tax Law, any Distribution, because of the confiscatory taxes of $750 Million to $1 Billion and the losses in the market value of $4 Billion to $6 Billion on the du Pont and Motors Common, was "unthinkable" and "prohibitive" and the Company would use the Flexible Plan, which was not harmful to the Preferred (A64; Ex. P, pp. 67-80, 389-393; Ex. Q, p. 80; Ex. FF, 9). The Company thereupon expended substantial effort and funds to effect enactment of this legislation (A73) which would enable them to distribute the Motors Common to the Family and the other common holders at tremendous tax benefits but would be to the detriment of the Preferred thereby aggravating the conflict of interest.

Petitioners never contended that the Dominant Group had no right to obtain the tax legislation if they felt that tax savings could be effected and drastic injury to the Motors Common investment and to the du Pont Common holders could thereby be avoided. However, having sponsored the legislation and aggravated the conflict of interest, inherent justice required that the Preferred be retired or the directors select a method that would be fair to the Preferred. Instead the Board and Dominant Group selected the method most harmful to the Preferred to advance their pecuniary interest.

(D) The Conflict Created by du Pont by Submitting the Decree Granting it the Right to Select the Method of Divestiture.

This Court in its mandate did not give du Pont the right to select the method of divestiture but instead remanded the case to the District Court to enter a judgment of divestiture (A64-65). Du Pont proposed the Divestiture Decree granting the Company the selection of the methods or combination of methods of divestiture, thereby creating a conflict of interests between the Family and the Preferred as to the methods to be employed. The Dominant Group was therefore duty-bound to select a

method which would not injure the Preferred. It is a well established precedent that a fiduciary may not benefit from a conflict of interest he has created with his *cestui*. This Court so held in *Michoud* v. *Girod*, 45 U. S. 503, 555 (1846) where the court stated: "The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity."

POINT TWO

The Board and Dominant Group did not consider that they had nor did they observe any fiduciary duty to the Preferred in respect of the divestiture of the Motors Common. Du Pont claimed an absolute power under the Preferred contract to effect divestiture solely by Distribution. This power was subject to equitable obligations to the Preferred that could not be avoided by resorting to legal form, statutory authority or charter sanction.

The conclusion based on the stipulated facts and du Pont's briefs in the Courts below is inevitable that the Board and Family did not recognize they had nor did they observe any fiduciary duty to the Preferred. Although du Pont asserted that the "Board of Directors owes a fiduciary duty to the preferred shareholders" (Resp. Br. C.A. p. 20),[23] this was merely lip service for du Pont acted on the basis that the Preferreds' rights were merely contractual and no fiduciary duty was owed to the Preferred in the determination of the method of divestiture.

The respective rights and obligations of the Common and Preferred holders cannot be determined *in vacuo* by an exposition of general abstract principles of law but must be adjudicated in the light of the situation which

23. Unless otherwise indicated respondent's briefs in the Court of Appeals will be referred to as "Resp. Br. C.A."; its brief in the Trial Court "Resp. Br. Tr. Ct." and brief on the preliminary injunction "Resp Br. Pre. Inj."

actually exists. In the instant case, a determination whether an equitable obligation was superimposed on the contractual rights defined by the Preferred contract and whether such obligation was violated by the Distribution is inextricably interwoven with the status of the persons electing to effect divestiture in that manner and the nature and magnitude of the asset distributed with its relationship to the net worth and income of the Company. In addition, various other factors were relevant to the rights of the Preferred and the fiduciary duties of the Board and Dominant Group such as the conflict of interests of the Board and Dominant Group with the Preferred; the emphasis in the Prospectuses upon the Motors Common when the Preferred was sold to the public; the commencement of the Divestiture Suit shortly after such sales; the holding was illegal and subject to divestiture at the time of the sale of the Preferred to the public; the re-purchase while the Divestiture Suit was pending by du Pont of the Preferred shares from the du Pont Pension Trust Fund without a comparable offer to the public Preferred holders; the purchase by du Pont, while such Divestiture Suit was pending, of an additional substantial amount of Motors Common which is included in the Distribution; the activities and expenditure of funds by du Pont in connection with the sponsoring of the Preferential Tax Law, thereby creating a conflict with the Preferred; the representation to various Preferred holders with respect to the protection by the Company of their interests on the divestiture; and the submission by du Pont to the District Court of the decree granting du Pont the right to select the method of divestiture aggravating the conflict of interest.[24] Similarly, relevant to the rights of the Preferred was the fact that divestiture of the Motors Common was not a matter of voluntary business judgment but was compelled by a decree in a suit in equity under the Clayton Act

24. These factors will be discussed in detail hereafter.

which imposed the requirement of fairness in devising the plan of divestiture.

Du Pont persisted in the courts below that the rights of the Preferred consist solely of (1) the right to specified dividends prior to dividends to the Common and (2) prior rights to certain specified dollar amounts upon liquidation before payments to the Common holders. Respondent stated: "These provisions of the charter constitute not only the guidelines which determine the rights of the preferred stockholders but also those which determine the duties of the board of directors" (Resp. Br. Temp. Inj. p. 29. See also Resp. Br. C.A. pp. 4-5, 18, 24, 27-38). The Board and Dominant Group make the limitations on the rights of the Common the totality of the rights of the Preferred and limit their fiduciary duties accordingly. Respondent discussing the fiduciary duty to the Preferred urged that the "existence of such a duty, however, does not create rights of one class of shareholders against another—rather such rights as are created by the Charter and statutes are what give rise to correspondent duties" (Resp. Br. C.A. p. 20).[25] Du Pont therefore contended that the "distribution of the General Motors stock will be made entirely out of surplus" and the "rights of the preferred stockholders will, therefore, stand unimpaired" (Resp. Br. C.A. pp. 17-18; Resp. Tr. Ct. p. 21). Respondent denied it owed the Preferred any fiduciary duty with respect to the asset and income coverage inherent in the Motors Common, stating (Resp. Br. Prel. Inj. p. 29):

25. Respondent repeated the rhetorical questions on fiduciaries asked by Mr. Justice Frankfurter in *Securities Comm'n* v. *Chenery Corp.*, 318 U. S. 80, 85-86 (1943) to establish that in the instant case no fiduciary duty was owed to the Preferred holders. However, Mr. Justice Frankfurter stated: "We reject a lax view of fiduciary obligations and insist upon their scrupulous observance." That action did not involve the reorganization managers of the company dealing with the assets of the company nor did their actions "In any way prejudice the interests of the corporation or its stockholders." In the instant case, the Board and the Dominant Group are dealing with the assets of the Company.

> "The plaintiffs appear to complain that the distribution of the General Motors stock to du Pont common stockholders is in derogation of their rights because it will reduce the asset coverage of the stated value of their stock and the earnings coverage of their annual dividends. If such had been the case, it would have been because the right not to have such asset and earnings coverage reduced had been conferred upon them by the charter and not because of any circumstances peculiar to this case which confers that right upon them."

Respondent even asserted: *"Under the decided cases the only significance of the existence of a controlling group is to give rise to a fiduciary obligation to those who are controlled, namely the minority stockholders"* (italics ours) (Resp. Br. C.A., p. 21).[26]

This conviction of respondent of absence of interest in the Preferred and of fiduciary duty on the Board and Dominant Group so conditioned their thinking as to render them incapable of making a proper determination as to the fair method of divestiture. The Pippin Report stated: "Divestiture of the Company's GM stock by distributions to its common stockholders would not impinge upon the rights of the preferred stockholders," and "Accordingly, no legal obligation to preferred stockholders would arise as a result of the distribution of GM shares to common shareholders" (A98).[27]

Respondent asserted, in essence, that the Preferred holders had rights in the assets of du Pont only to the extent of $469 Million, the amount of the outstanding capital stock or 10% of the total net worth of the Com-

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26. In furtherance of this contention, du Pont moved before the Trial Court to strike from the record as immaterial and irrelevant all the paragraphs and exhibits of the Stipulation establishing control of du Pont by the Dominant Group. The motion was denied upon manifest absence of prejudice (Resp. Tr. Br. p. 37; A5).

27. So entrenched was this opinion that Pippin asserted "any nuisance suits by preferred stockholders who believe that their rights would be violated by the distribution" for any injunction or damages would, in the "opinion of Legal Department (T. E. Clough)", be found groundless and dismissed without delay (A99).

pany. Since the total net worth of the Company, with Motors at market value, was $4.871 Billion, du Pont claimed it owed the Preferred no duty as to $4.402 Billion which it could distribute regardless of the damage caused to the Preferred or the motives of the directors or controlling holders. The rights of the Preferred in all of the assets of the Company, including current assets, investment in securities, plants and equipment, good will, etc. are identical with the Common holders which is limited as to priority of dividends and assets on liquidation. *Commissioner of Internal Revenue* v. *Meridian & Thirteenth Realty Co.*, 132 F. 2d 182; *Roberts* v. *Roberts-Wicks Co.*, 182 N. Y. 257. All assets are in essence, commingled or fungible; none are ear-marked for the Preferred or Common; and none are excluded from their interest. The Preferred holders have a most substantial right and interest in every asset of the Company at all times and this interest had to be considered in determining the method of divestiture.

Du Pont's view that no fiduciary duty was owed to the Preferred with respect to 90% of the assets of the Company, we submit, is dissipated by the hypothetical question: Is the preferred holder without rights where a board of directors wrongfully applies the funds of a corporation, though not to the extent of impairment of its capital or, to serve its own interest, distributes all of the liquid and saleable assets leaving only obsolete machinery, plant and equipment with a book value slightly in excess of the capital? The breach of a fiduciary duty, just like a breach of duty not to misappropriate, can be the gravamen of the complaint and the loss of coverage with attendant injury to the investment value of the preferred, like loss of the physical assets, can constitute injury.

The definitive rule of equity which has evolved is that every "absolute corporate power" is a "power in trust" which imposes upon directors and controlling holders the fiduciary obligation to use such power fairly and equitably and not in derogation of the rights of the minority or other stockholders, particularly where they are acting in a

conflicting position without arm's length bargaining. In *Pepper* v. *Litton, supra,* emphasizing the necessity for "fair play and good conscience" as standards applicable to the gamut of absolute corporate powers exercised by directors and controlling holders, this Court stated (p. 311):

> "For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of the *cestuis.*"

In *Case* v. *New York Central Railroad,* 19 A.D. 2d 383, (Oct. 1963) the New York Central Railroad ("Central") which owned 80% of the stock of Mahoning Coal Railroad Company ("Mahoning"), filed a consolidated income tax return in which the earnings of that subsidiary were offset by Central's large losses, effecting a tax saving of about $3,825,000. The subsidiary paid to the parent about $3,557,000, leaving about $269,000 to the subsidiary, or about $50,000 to its minority stockholders, a small gain which it would not otherwise have had. The court held that the fiduciary obligations of the parent to the minority holder in a subsidiary must be observed and ordered a refund of the tax savings to Mahoning, stating (p. 387):

> *"In this case one thing is clear, namely, that appropriation of all of the tax savings except for the minimal amounts involved on inter-corporate dividends is not fair."* (Italics ours.)

See *Kavanaugh* v. *Kavanaugh Knitting Company,* 226 N. Y. 185 (absolute power of dissolution is subject to the good faith of the individual defendants); *Lebold* v. *Inland Steel Co.,* 7 Cir., 125 F. 2d 369 (the absolute power of dissolution found in a statute is not thereby vested with the attributes of tyranny); *Bennett* v. *Breuil Petroleum Corp.,* 34 Del. Ch. 6 (the issuance of new shares of stock to freeze out minority interest is actionable without regard to the fairness of the price of the stock); and *Jones* v. *Missouri-Edison Elec. Co.,* 144 Fed. 765 (C.C.A. 8, 1906) (breach of trust of a fiduciary while in the exercise of

a lawful power is as fatal in equity to the resultant act as the absence of power); *Liebschutz* v. *Schaffer Stores Co., Inc.*, 276 App. Div. 1, appeal denied 276 App. Div. 944 (absolute power to redeem plaintiff's old preferred stock exercised to forestall his right of appraisal or to obtain new preferred stock is subject to fiduciary duty).

The leading article, A. A. Berle, Jr., "Corporate Powers as Powers in Trust," 44 Harvard Law Review, 1049, No. 7 (May 1931) completely dissipates respondent's position that the Preferred contract is not subject to any equitable limitations stating at p. 1073:

> "By contract shareholders may distribute rights and participations *inter sese*. They may grant to one of their number a senior preferred position and to another a junior position; they may divide or limit rights in assets or the immediate participations in earnings as they agree. These are individual agreements among themselves. But where powers are conceded to the management or to any group to act for the corporation as a whole, the obvious, if tacit assumption is that those powers are intended to be used only on behalf of all. *They are distinctly not intended to be granted for the purpose of benefiting one set of participants as against another.* To do so would be to violate every intendment of the whole corporate situation.
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> Courts, accordingly, have been substantially forced to the conclusion here expressed: namely, that no power, however, absolute in terms, is absolute in fact: that every power is subject to the essential equitable limitations." (Italics ours.)

See also Lattin, "Equitable Limitations on Statutory or Charter Powers Given to Majority Stockholders," 30 Michigan Law Review, 645 (Feb. 1932); and Rohrlich, "Corporate Control by Minority Stockholders," 81 Pa. Law Review, 728.

The fiduciary duty of the directors and controlling holders to the preferred holders is more stringent where the preferred stock has no voting power as in the instant case. See *Kidd* v. *Traction Co.*, 74 N. Y. 160 (1907); 41

Illinois Law Review, p. 128; *Zahn* v. *Transamerica Corp.*, 162 F. 2d 36 (C.A. 3d Del. 1947). The cases emphasize the disqualifying nature of a conflict of interest upon the right of a director or controlling holder to act and such acts are voidable in equity, and the Board controlled by the Family, we submit, was disqualified from selecting the method of divestiture because of the tremendous conflict between the Family and the Preferred unless it first eliminated the conflict. *Pittsburg, C., C. & St. L. Ry. Co.* v. *Dodd*, 115 Ky. 176; *Covington & Lexington Railrod Co.* v. *Bowler's Heirs*, 72 Ky. 468.

The cases as cited by respondent (Resp. Br. C.A. pp. 17-18) have no application to the case at bar for there no conflict of interest existed; the decisions of the directors were based upon sound business judgment and not forced on them, contrary to their best judgment, by a court order; the actions did not involve distribution of 65% of the assets of the company; and the controlling holders were not saving $220 Million in taxes. However, the cases cited by respondent did reiterate the fundamental principles of equity with respect to fiduciary duties owed by directors and controlling holders to minorities. *Fraser* v. *Great Western Sugar Co.*, 14 N. J. Misc. 610, quoted at length by respondent to prove "extraordinary dividends" (15% of the net worth) may be paid, upon appeal (120 N.J. Equity 288), was affirmed solely on the ground that plaintiff was guilty of laches.

POINT THREE

The divestiture of Motors Common was compelled by a decree in an equity action instituted under the Clayton Act. The selection by the Board and Dominant Group of the method of divestiture was subject to the equitable obligations of a court of equity.

The Distribution constituting 65% of du Pont's net worth was not based on a voluntary business judgment after considering the interests of all the stockholders and

the effects on the Company (A58, 64). For 13 years du Pont had fought in the courts, at great expenditure of time and money, to retain the Motors Common as being in the best interests of, and to avoid injury to, the Company and its stockholders and was even prepared to insulate the vote on all their shares to accomplish this end (A63-64). Respondent, of course, admits the divestiture was not voluntary but was compelled by the Divestiture Decree (A58).

The mandate of this Court and the Divestiture Decree were entered in a proceeding in equity instituted by the Government under Section 15 of the Clayton Act. The equity jurisdiction of the District Court having been invoked by this suit, the inherent powers of the court were called into play, where necessary, to do justice and grant full relief including the formulation of a plan of divestiture which would be fair to the whole community of interests in the corporation including the senior securities. See *Aldred Investment Trust* v. *Securities & Exchange Comm'n*, 151 F. 2d 254.

The equitable nature of the anti-trust proceedings cannot be questioned. In fact, respondent's principal contention before the District Court and this Court, to avoid distribution as the means of divestiture, was that the anti-trust suit is a proceeding in a court of equity subject to all equitable principles which should have full scope unless restricted by the legislation; and that, in formulating anti-trust decrees the court is duty-bound to mitigate, when not in conflict with the public interest, any injury to stockholders and others in interest, particularly if they are innocent (Ex. P, p. 334).[28] This Court in the Divestiture Opinion acknowledged the equity nature of actions to restrain violations of the Clayton Act and stated at p. 328, footnote 9: "* * * Congress would not be deemed to have restricted the broad remedial powers of courts of equity without explicit language doing so in terms, or some other strong indication of intent. *The*

28. For some other similar expressions, see Ex. P, pp. 339, 374, 414, 417, 419, 420 and 425.

Hecht Co. v. *Bowles*, 321 U. S. 321, 329 (1944)." On the remand of the case, this Court stated at p. 335: "In this way the District Court will be free to fashion a new decree consistent with this opinion at a new hearing at which all parties may be heard." The opinion required du Pont to file a proposed judgment providing for complete divestiture of the Motors Common and the Government to file either specific amendments to such du Pont judgment or a proposed alternate judgment of divestiture.

The Divestiture Decree proposed by the Company directed that du Pont divest itself of the Motors Common by distribution or pro rata distribution or in the alternative by any methods or combination of methods that du Pont might select (A58-59; Comp. Ex. C, Article VIII, par. 5, p. 12). Clearly, the Divestiture Decree did not set forth a definitive plan but was merely a broad general decree of divestiture with the power in du Pont to select the ultimate methods. The Divestiture Decree made no provision for the submission to the District Court for its approval of the definitive plan for divestiture selected by du Pont.[29] In reality, the resolution of the Board of Directors of May 31, 1962 providing for the initial distribution of Motors Common and the simultaneous announcement by the Board of the Distribution of all or substantially all of the Motors Common in three or four installments prior to the end of February 1965 (A59) constituted the definitive plan. The Board and Dominant Group in devising the plan assumed the equitable obligations inherent in a court of equity in formulating plans of divestiture. These obligations were particularly applicable in the instant case where the interests of the Dominant Group were irreconcilably adverse

29. Article VIII, D, of the decree required du Pont to notify the Justice Department seven days in advance of any disposition, except sales on a registered stock exchange or by public offering, of disposition by exchange offers of Motors Common to du Pont stockholders, including the Preferred showing the terms, conditions, identity of the prospective purchaser or transferee and similar details. In the event that the Anti-Trust Division interposed objection after the receipt of such notice, the disposition or exchange offer was not to be made until it had first been approved by the court.

to the Preferred. The "power" delegated to the Board and Dominant Group to select the method of divestiture was a "power in trust" subject to the equitable limitation of a court of equity that it would be used in a manner fair to the Preferred.

The mandate of this Court or the Divestiture Decree would supersede state law, charter provisions, statutory authorizations, legal forms or private contracts such as stockholders' agreements relating to their respective rights. See *SEC* v. *Central-Illinois Corp.*, 338 U. S. 96 (1949); *Schwabacher* v. *United States*, 334 U. S. 182 (1948), and *Otis & Co.* v. *SEC*, 323 U. S. 624 (1945). Similarly, the divestiture plan formulated by du Pont under the Divestiture Decree would have the same superseding force. The Board and Dominant Group had the power and the duty to formulate a plan not repugnant to the interests of the Preferred, unfettered by any private contracts, such as preferred agreements or state laws. Instead, they took the position that the Preferred holders were bound by the Preferred agreement, their rights were limited solely to priority of dividends and assets upon liquidation, and the Distribution could be effected regardless of the motives of the Board and Dominant Group and effect on the Preferred.

This Court stated in the Divestiture Opinion (p. 326): "Courts are not authorized in civil proceedings to punish anti-trust violators, and relief must not be punitive." Du Pont urged this thesis repeatedly to oppose a mandate or order of divestiture and to obtain the Preferential Tax Law. However, as concerns their own pecuniary interests, the Board and Dominant Group used the mandate as a basis for obtaining the tax legislation to enable them to distribute the Motors Common at a saving to them of $220 Million in taxes, and propounded a plan under the discretionary Divestiture Decree which penalized the Preferred to the extent of depriving them of $3.15 Billion of asset coverage and $145 Million annually in income coverage (A61-63; Ex. P, p. 76).

Du Pont also had urged in this Court that a Divestiture Decree requiring distribution under the prior tax law would impose penalties upon the Common holders which bore no necessary relationship to the number of shares of du Pont which they owned, to their participation in the management of du Pont or to their personal responsibility for or knowledge of the violation of the Clayton Act (Ex. P, pp. 379, 417). Yet, the Board and Dominant Group shifted the punitive aspects from themselves, who were responsible for the violation of the law, to the Preferred holders who were entirely innocent, although the Company told the House Committee referring to the punitive aspects of divestitures: "The intent is to secure a remedy with as little harm to anybody as possible. There is no punitive purpose in remedies under this Clayton Act" (Ex. P, p. 79). In view of the facts that the discretionary divestiture decree grew out of the mandate of this Court and the plan of divestiture solely by Distribution resulted from this proposed decree by du Pont, du Pont's contention that no duty was owed to the Preferred with respect to the divestiture and the conflicting position of the Board and Dominant Group with the Preferred, we submit that a review by this Court is essential to ascertain whether they complied with the equitable principles imposed upon them by the mandate of this Court.

In addition to the equitable obligations imposed by their illegal act, a duty to be fair was imposed on the Board and Dominant Group by reason of the fact that the divestiture was forced. The Amicus urged that although normally the function of management is to determine what part of the assets of a corporation can be properly and safely distributed to its stockholders, in the case at bar the involuntary distribution "of assets having a value far in excess of total accumulated earnings of the corporation" would not be fair to the Preferred holders (Ex. N, p. 111).

Similarly, du Pont had urged upon the Congress the justice of enacting the Preferential Tax Law by analo-

gizing to the tax dispensation granted to bank holding companies and public utility holding companies compelled to dispose of their subsidiaries under the Bank Holding Company Act and the Public Utility Holding Company Act respectively (Ex. P, p. 76). However, under the Public Utility Holding Company Act, Sec. 11(b), 15 U.S.C. 79k, the divestiture plan had to be approved by the Securities Commission which had as one of its primary purposes the protection of senior security holders.

POINT FOUR

Various acts of commission and omission of the Board and Dominant group imposed on them obligations to divest in a manner consonant with equity and good conscience.

In addition to their general fiduciary duty as directors and controlling holders and their equitable obligation in assuming the duty to select the method of divestiture under the decree entered in the anti-trust equity action, the directors and controlling holders owed various obligations to the Preferred by reason of various acts committed by them.

(A) The Representations in the Prospectuses on Motors Common.

The Preferred was sold to the public on Prospectuses placing strong emphasis upon du Pont's investment in Motors Common which the Amicus stated enabled the Company to market its Preferred at "low dividend rates and other very favorable terms" and that buyers of the Preferred on original issue and subsequently although not guaranteed that this asset would be retained.

> "• • • did have a reasonable expectation, such as would have been taken into consideration by the ordinary prudent purchaser, that the history of du Pont and its established policies were such that this asset, with its high earning power, would be available for the protection and the maintenance of value and marketability of their investment" (Ex. N, p. 113).

The Amicus, therefore, urged fairness required the retention by the Company of 13 million shares of Motors Common, or the proceeds of their sale, for the continued security of or possible exchanges with the Preferred (Ex. N, pp. 112-114). Similarly, the Pippin Report confirmed, regarding the Motors Common, that while not so expressly stated, "the Prospectuses leave the impression that the GM stock and earnings therefrom would, in the normal course of business, be available to protect the interests of the Preferred stockholders" (A99-101).

The representations in the Prospectuses as to the Motors Common constituted an express or implied contract that no disposition would be made of this asset except in the best interest of the Company; and that in the event of unusual circumstances such as a forced divestiture, the asset and income coverage of the Preferred would be protected by an equitable disposition of the Motors Common.

In a comparable situation in *United Funds, Inc.* v. *Carter Products, Inc.*, Md. Balt. City Cir. Ct., #A42888 (May 1963), C.C.H. Fed. Securities Law Rep., Current Decisions, p. 94281, par. 91288, the court, after a comprehensive analysis of all the authorities, held that statements in the prospectus that the company intended to list the stock on the New York Stock Exchange constituted with respect to original and subsequent purchasers a contractual obligation, express or implied, to continue the listing.

(B) Motors Common Subject to Divestiture at Time of Sales of Preferred.

The Motors Common was illegally held and subject to divestiture at the time of the sale of the Preferred to the public upon Prospectuses which emphasized this ownership and aided its sale at the low yield rates and other favorable terms. The undisputed fact is that at the time of the adoption of Distribution as the sole method of divestitute, the Company did know that such holding was wrongful from its inception. As a consequence, the

Board and Dominant Group are duty-bound to prevent this illegal holding from being the proximate cause of the injury to the Preferred.

(C) Commencement of Divestiture Suit Shortly After Sale of Preferred to Public.

The Company sold $70 Million of the 3.50 Preferred to the public on the 1947 prospectus, only about one year before the relationship between du Pont and Motors was presented to a Grand Jury (no action was taken by the Grand Jury), and about two years before the civil divestiture action was instituted (A60). Fairness, under these circumstances, required, that in the event divestiture was decreed, steps be taken to avoid injury to the Preferred.

(D) The Re-purchase by du Pont of the Preferred from the Pension Fund During Pendency of the Divestiture Suit.

The Company in February 1954, while the Divestiture Suit was pending, re-purchased the $30 Million of the 3.50 Preferred sold to the du Pont Pension Fund at the time that the $70 Million was sold to the public, without a comparable offer to repurchase from the public holders (A51). As long as the Motors Common was owned by du Pont and the coverage of the Preferred maintained, no injury was occasioned to the Preferred by this re-purchase. However, the Pension Fund's $30 Million purchase was removed from any possible injury by reason of the Divestiture Decree while the public Preferred holders are being deprived of a most substantial part of their asset and income coverage. We submit this re-purchase, under the circumstances, imposes an equitable duty on du Pont to treat the public Preferred holders fairly.

(E) The Purchase by du Pont of Additional Shares of Motors Common During Pendency of Anti-Trust Suit.

The Company acquired in 1955 for $75 Million out of general corporate purpose funds, while the Divestiture Suit was pending, an additional one million shares of Motors Common, subsequently split into 3 million shares

with a present market value of about $250 Million (A55-56, 110). The Company thus increased its unlawful holding in Motors Common in the face of the anti-trust suit and thereby is depriving the Preferred holders of this $250 Million of asset coverage and related income. These Motors Common are included in the distribution on which the non-corporate du Pont Common holders including, the Family, will pay only a capital gains tax. The Pippin Report asserted this acquisition with general corporate funds "might suggest that these 3MM shares should be sold so that proceeds therefrom will flow back into the Company's general cash resources," but he, however, concluded "that there would be no basis for a decision to sell GM shares on the grounds that such sales would be advantageous to the common stockholders" (A109-111).

(F) Representations by du Pont to Preferred Holders that Their Interests would be Protected on the Divestiture.

Letters were sent by du Pont to all stockholders, Preferred and Common, urging them to write to their Congressmen regarding the Preferential Tax Law. Some Preferred holders, inquiring about the treatment to be accorded their stock under the divestiture, were informed that it would be to the best interest of both Preferred and Common holders to strive for the passage of this legislation, and were also assured that du Pont would continue, as it has in the past, "to fully consider the interest of all the stockholders of all classes" (Ex. FF). Walter S. Carpenter, Jr. ("Carpenter"), Chairman of the Board, wrote to one of the petitioners that du Pont will do its "very best to recognize the interests of all our stockholders of all classes" (Ex. FF-12a), and to Mr. Willard D. Humphrey, a Preferred holder, that du Pont is "endeavoring to find a path that recognizes the rights of all, with least violence to any" (Ex. FF-4a), and to John Sieker, one of du Pont's "very small" Preferred holders, who wrote asking how the distribution of some $3.5 Billion of the Company's assets could be effected "without seriously impairing the present high quality rate of the

preferred stock" du Pont replied: "it would be in the best interests of all our stockholders, Preferred and Common, to strive for the passage of H.R. 8847," and that du Pont would "continue, as we have in the past, to fully consider the interests of all of our stockholders of all classes in arriving at a solution of this difficult problem."[30]

However, immediately upon enactment of the tax law on February 2, 1962, du Pont discontinued including in its letters to Preferred holders the assurance that it would consider the interest of all the stockholders of all classes (Ex. FF, 23a-27a). Is it contended by respondent that these assurances to the Preferred holders only applied to priority of dividends and assets on liquidation which respondent now claims is the totality of the Preferred rights? What provision in the Preferential Tax Law transmuted respondent's concept of the rights and interests of the Preferred holders that du Pont insisted it would protect before the tax bill was enacted into a concept that the Preferred had no rights or interests in the Motors Common after the bill was passed?

Various letters by du Pont to the Preferred holders, although admitting that both the asset and income coverage would be reduced by the Distribution, stated that "our studies have indicated that the coverage in both these respects should continue to compare favorably with top high-grade industrial preferreds in the country" (Ex. FF, 17a to 27a). However, the fact is that the asset coverage was reduced to a point where the Preferred has a lower net tangible asset coverage than 47 of the 48 Preferreds and the income coverage was lower than 35, although 35 of the 48 Preferreds are rated lower than AAA (Schedules A and B annexed). Distribution could only injure the Preferred and the Board and Dominant Group, in view of these letters, were estopped from taking any action that was contrary to the interests of the Preferred.

30. For similar letters, see Exhibits 4a, 12a, 14a, 15a, 17a to 22a. The 27 letters from Preferred holders referred to in this petition include only those received by du Pont prior to the filing of the Pippin Report, dated March 13, 1962, which was 10 weeks prior to the announcement of the adoption of Distribution by the Company.

POINT FIVE

The Board and Dominant Group selected Distribution as the sole method of divestiture which redounded to their greatest benefit and to the greatest injury to the Preferred. The Distribution has caused irreparable injury to the Preferred.

The Board and Dominant Group with full knowledge of their irreconcilable conflict with the Preferred holders selected Distribution which was to the maximum benefit of the Family and greatest injury to the Preferred in lieu of the Flexible Plan or any other method of divestiture.[31]

(A) Benefits of Distribution to the Dominant Group.

The Distribution method was of maximum benefit to the Family for it permitted them (a) to withdraw $1 Billion or about 68% of their investment in du Pont;[32]

31. The Company wrote to one of the petitioners that the management hoped that the final decree to be entered would permit the use by du Pont of a flexible program that will best serve the interests of all classes of stockholders (Ex. FF, 12a).

32. Respondent attempts to vitiate the force of petitioners' argument that the du Pont Common holders including the Family are receiving, upon the basis of market value of the Motors Common, 68% of the net worth of the Company by claiming that if such a yardstick is employed, one should use, as a basis for comparison, the figure of $6.25 Billion, the market value of all the outstanding du Pont Common stock. Respondent's contention is wrong for on that theory, the "value" of du Pont declined over $4 Billion between March 14, 1962 and June 7, 1962, the du Pont Common market price having dropped $90 a share in that period (Commercial Financial Chronicle, Jan. 7, 1963, p. 13). This, of course, is not true. The Motors Common is a liquid marketable asset owned by du Pont and available for sale. The Company does not own the 46 million Common shares of du Pont outstanding nor does it have these shares for sale. The du Pont Common is owned by the Family and the public. The market price of du Pont Common is to some extent determined by the net assets of du Pont which are not available for sale and the appraised or sale value of most of which is unknown, but more important, the market price of the stock is determined by the opinion of the public and speculative influences. The market price of Motors Common is also subject to these influences but the fact remains the Motors Common owned by du Pont is available for sale and its value is the market price on the date of sale.

(b) to effect, because of their individual direct and beneficial ownership of du Pont, an aggregate income tax savings of about $220 Million on Distribution; (c) to effect tax savings of about $6 Million every year thereafter by the elimination of inter-corporate taxes on dividends paid by Motors to du Pont and by du Pont to Christiana; and (d) to effect diversification of their personal investments in lieu of having about $1 Billion indirectly invested in one company, namely, Motors. No other method of divestiture gave the Dominant Group all these advantages.

Crawford H. Greenewalt, then President of du Pont ("Greenewalt"), discussing the feasibility of the Flexible Plan under the prior tax law, told the Congressional Committees that under the Flexible Plan, 10 million shares of Motors Common could conservatively be distributed by exchanges for du Pont Common and Preferred with essentially tax-free consequences; 15 million shares partially in lieu of cash dividends; and 35 million sold by the Company on a capital gains basis and that the total tax would be $350 Million including $185 Million of taxes to be paid by Christiana and its stockholders (Ex. Q, pp. 77-81). Greenewalt further told the Treasury Department and the House Committee that it was in the range of accomplishment to distribute 30 million Motors Common by exchanges and that under those circumstances the total tax to be paid on the divestiture would be about $130 Million (Ex. Q, pp. 9-11, 79, 80), whereas du Pont told this Court that exchanges with the Preferred and Common was "wholly unfeasible" (Ex. P, p. 337) and that the Flexible Plan would result in the same confiscatory taxes ($750 Million to $1 Billion to the non-corporate stockholders) as distribution under the prior tax law (Ex. P, pp. 335, 389, 393, 421, 422).

Du Pont asserted to Congress it sought the tax legislation to avoid the claimed losses of $1 Billion to $2 Billion in the market value of Motors and du Pont Common because the Flexible Plan would increase the floating supply of Motors Common in 10 years by 40 million shares (Ex. Q, p. 69). The fact is that the announcement

by du Pont, three days after the May 28, 1962 market crash, of the Distribution in 34 months of 63 million shares or 22% of the Motors Common outstanding and an immediate distribution of 23 million shares had no depressing effect on its market price. Christiana and members of the Family in three secondary distributions within 18 months promptly sold 7 million shares of Motors Common for an aggregate of $465 Million (A81-83).[33] Du Pont relying upon the opinion, among others, of a partner in Morgan had urged upon this Court in the Divestiture Suit that the sale in a period of 10 years of 20 million shares of Motors Common by the Family at the then market price of $40 per share for a total of $800 Million, was a project unique in financial history and that "sales of this magnitude would have a substantially depressing effect on the market price of General Motors stock" (Ex. P, pp. 386, 387, 404). Actually, the market price of Motors Common rose from about $50 per share on the first secondary sale to an all-time high of about $90 per share, an increase of about $10 Billion in the market value on the total of about 285 million shares of Motors Common outstanding (The Wall Street Journal, Oct. 11, 1963).

Regardless of the Family's belief as to the adverse effect before the first distribution, the Board and Dominant Group now know that their concern was completely unfounded, and there is absolutely no justification for not using the Flexible Plan with respect to the 23 million shares still to be divested. However, it is apparent that no part of the Flexible Plan was used because such use would reduce the number of Motors Common available for withdrawal by the Family at a capital gains basis. Thus, sales of the Motors Common by du Pont would eliminate the shares sold from the

33. The Motors Common was sold to the public on the first secondary distribution for about $50, the second at about $58 and the third at about $78. There can be no doubt that a substantial amount of the approximately 28 million shares of Motors Common distributed to the approximately 210,000 individual public du Pont Common holders, was also sold by them in this period (A56).

Distribution and the proceeds would remain in the Company and not be available for dividends except upon payment of normal income tax; distribution of the Motors Common partially in lieu of cash dividends would have similar effect; exchanges of Motors Common for the Preferred would reduce the number of shares to be distributed to the Family and according to du Pont, would require the payment of a premium to induce such exchanges. Exchanges of Motors Common for the du Pont Common would subject the Family to the risk of dilution of their voting control of the Company and involve the payment of premiums.

(B) The Irreparable Injury to the Preferred Caused by Distribution.

The financial strength of the issuer is an essential factor in fixing the price of a senior security and thereby its yield. The greater the amount of "cash" assets, such as cash, marketable securities and accounts receivable, the greater the security to the Preferred. An abundance of fixed assets does not necessarily result in financial security.[34] As indicated, the Amicus and Pippin emphasized that the assurance of dividends from and the marketability of Motors Common represented security to the Preferred, and the Distribution would have an adverse impact on the Preferred.

Du Pont in the courts below attempted to create the impression that the Preferr after the Distribution was *sui generis* as concerns safety and economic factors which determine the quality of senior securities. There can be no doubt that with the Motors Common the

34. An outstanding example is the New York, New Haven & Hartford Railroad $100 preferred stock which, more than covered asset-wise, sold for about $2.50, the company is in receivership; and the stock delisted. Many of its fixed assets have become "liabilities" creating overhead and little or no income. This latter condition also prevailed during the Great Depression of the 1930's for highly rated companies. For example, the steel mills ran as low as 20% of capacity and their plants only created overhead and losses (Moody's 1962).

Preferred was one of the highest ranking preferred stocks, and without the Motors Common, its status has been markedly downgraded. We set forth a summary of some of the economic factors of the Preferred, with and without the Motors Common, showing the marked adverse effect of the Distribution:

	Per Share of Preferred		
	Net Tangible Assets	Net Cash Assets	Earned
Including Motors	$2,021.00	$1,623.00	$175.00
Times Covered	20.2	16.2	41.6
Excluding Motors	$ 703.00	$ 304.00	$114.00
Times Covered	7.	3.	27.2
% of Reduction After Distribution	65%	81%	35%

The percentage of Preferred to total capitalization of the Company increased 184% from 4.9% to 13.9%.

The net effect of the Distribution was to reduce the net tangible asset coverage per share of the Preferred to a point where it was lower than 47 of the 48 Preferreds whereas prior to the Distribution it was lower than only 23; its net cash assets per share became lower than 33 while before it was lower than 9; the earnings per share lower than 34 but before the Distribution it was lower than 26; and the percentage of the Preferred stock to total capitalization was higher than 47 of the 48 Preferreds whereas formerly it was higher than 24.[35] The Family, which is saving $220 Million in taxes on the Distribution made the decision that it did not matter to the Preferred if the Distribution reduced its asset coverage to a point where it is lower than 47 of the 48 Preferreds, 35 of which are rated below AAA.

A Preferred stock can be down-graded and its investment value and market price hurt by the loss of asset

35. For details of the adverse effect on the Preferred by the Distribution, see Schedule A comparing the Preferred with the 29 Preferreds considered by Petito and Schedule B comparing the Preferred with the remaining 19 Preferreds rated AA.

and income coverage although it continues to have a good rating and "adequate" coverage. This is evident from the following comparison of the preferreds of Eastman Kodak Co. ("Eastman"), Ingersoll Rand Co. ("Ingersoll") and du Pont (Moody's Volume 1962) which are all rated AAA and none of which have any bonded indebtedness:

	Du Pont (Excluding Motors)	Eastman	Ingersoll
Net Tangible Assets (per Share)	$703	$8,183	$5,966
Net Cash Assets, (per share)	304	4,095	3,822
Earnings (per share)	114	1,377	942
Times Preferred Dividend Covered	27.2	374.9	157
Percent of Preferred Stock to Total Capitalization	13.88%	0.6%	1.7%
Yield 12/31/62*			
3.50 preferred	4%	3.6%	3.8%
4.50 preferred	4.2%		

* Standard & Poor's Stock Guide Dec. 31, 1962.

The yield on the 4.50 Preferred was approximately 16% and 10% more than the yield on the Eastman and Ingersoll preferreds respectively.[36] On this basis, the Eastman and Ingersoll preferreds would sell for $116 and $110 respectively, if the du Pont 4.50 Preferred sold for $100. The total Preferred outstanding; if it were selling on the same yield basis as the Eastman preferred, would sell on the market for $35 Million higher and if on the same yield basis as Ingersoll for $20 Million higher. Respondent attempted to denigrate the importance of asset and income coverage on the yield and market price of the Preferred claiming that intangible factors, such as management, product, industry, etc. are important considerations in evaluating the quality of a senior security and, therefore,

36. The Eastman preferred was callable at $100 after 1963 and Ingersoll's was not callable, whereas the du Pont 4.50 Preferred was callable at $120 and the 3.50 Preferred at $103 per share and should, therefore, have a greater market value.

its market price. Does respondent attempt to justify the higher market prices of Eastman and Ingersoll preferreds upon the ground that these intangible factors were of a lower quality for du Pont?

Standard, of which Smerling is Vice-President, discussing defaults in senior securities, stated "'loss' means anything from outright default to a deterioration of the issue in relation to comparable bonds in the market." (The New York Times, July 7, 1963, p. F-10). The elimination of $3.15 Billion of Motors Common from the security of the Preferred constitutes a loss because the Preferred suffers in relation to comparable preferred stocks with which it "competes" in the market. Judge LaBuy stated that the stockholders would be damaged by the loss of the diversification afforded by the Motors Common. The Trial Court found that the Distribution of the Motors Common to the Common shareholders will deprive the Preferreds "of certain desirable security" (A31).

Competitive factors and prices have already had their influence on the Company.[37] From 1955 to 1961, the average operating investment of du Pont increased $1 Billion whereas the net income from operations declined from $6.51 to $5.72 per share while the net income from Motors dividends rose from $2.75 to $3.16 per share (Ex. G, p. 40).

Respondent contended in the lower courts (Resp. Br. C.A. pp. 10-12) that (a) du Pont's total net assets exclu-

37. Harvard Business Review, Nov.-Dec. 1962, p. 10, Article "Thinking Ahead", by Morrison & Neuschel, states (p. 54) that "Just before World War II, du Pont entered the nylon business with an investment of $27 million. For the following 15 years it is estimated that ⅓ of du Pont's earnings were derived from nylon. Two years ago du Pont introduced Delrin, which though much less spectacular in its market implications than was nylon, nevertheless required a considerably greater investment over $40 million before the first pound was sold. Within a month after du Pont hit the market, a major competitor was in the business with a similar product, and the price slid from 80¢ to 65¢ a pound. Du Pont is reported to have estimated that even if successful in defending its patent position, it will do well to earn back its investment in 10 years."

sive of Motors Common exceeded $1.7 Billion, more than 7 times the stated value of the Preferred, but did not indicate that of this coverage $914 Million is fixed assets, plants and equipment; (b) du Pont's "net assets * * * applicable to commercial activities" included about $775 Million of net current assets but did not indicate that this is only 3.2 times the Preferred shares outstanding and of these net current assets $309 Million is highly specialized chemical inventories; and (c) since the last sale of Preferred stock in 1947, du Pont has retained $1 Billion of earnings which has been reinvested in its commercial activities but did not indicate that $630 Million of this amount was invested in plants and equipment (Ex. 7, pp. 34-35; Ex. G, p. 32). Respondent justifies the Distribution of $3.15 Billion of marketable and liquid Motors Common upon the basis of this increase in fixed and illiquid assets.

Respondent tried to minimize the effect of the emphasis of the Motors Common in the Prospectuses by stating that the assets of du Pont, other than the Motors Common, have increased since the sale of the Preferred to the public. We submit that taking into consideration the inflation of the dollar during this period, the coverage of the Preferred in 1939 was greater than it is at the present time. The plants and equipment as of December 31, 1961 totalled $914 Million after depreciation and obsolescence and the inventories totalled $309 Million, a total of $1.2 Billion out of a total capital of $1.7 Billion excluding the Motors Common (Ex. G, pp. 32-33). In the event of any serious reversal in the economy, these highly specialized chemical plants and inventories will be worth much less whereas the Preferred outstanding will remain unchanged.

Pippin's figures show that real injury will be done to the Preferred's coverage by the Distribution. After 22 years, 1939 to 1961, of the greatest inflationary boom in the history of the country, the Preferred asset coverage increased, according to Pippin, from 5.9 times including

Motors Common to only 7.2 times excluding Motors Common, a substantial part of which is fixed assets (A100). *However, the working capital per share of the Preferred was reduced 34% from 4.86 times including the Motors Common in 1946 to 3.2*[38] *times in 1961 after the Distribution proving the injury to the Preferred* (Ex. F, pp. 34-35; Ex. G., p. 32).

No amount of argument can becloud the fact that du Pont without the 63 million shares of Motors Common is not the same Company as du Pont with the 63 million shares, and that the Preferred stock is not the same security.

Respondent's attempt to create the impression that the Preferred holders are seeking to obtain a wind-fall by an exchange of Motors Common for Preferred or the calling of the Preferred at a premium above market is negatived by the relief requested in the complaint, which is clear and unequivocal, for an injunction restraining the Distribution until a plan fair to all of the stockholders is promulgated. What petitioners seek is to mitigate the injury to the Preferred which may entail a reduction in the wind-fall to the Family. The insistence by petitioners upon the protection of their investment is not captious or unreasonable. This was precisely the position taken by Pierre du Pont in a letter to John J. Raskob in 1923 discussing the refinancing of the Christiana bonds:

> "this to avoid the bare possibility that some financial cataclysm might mak[e] our bonds become due through insufficient collateral at a very inopportune time. Bearing in mind that this obligation is backed by the working control of the entire du Pont Co. it seems wrong to jeopardize that control even in a remote degree in order to obtain as little as $5,000,000." (Ex. BB)

The Family in connection with their own investments and control of du Pont were not prepared to jeopardize

38. This 3.2 times figure includes $70 Million contributed through the sale of the 3.50 Preferred in 1947.

their interests even on the bare possibility of some financial cataclysm. The Board and Dominant Group should be no less considerate of the investments of their Preferred holders.

The Preferred has been irreparably injured by the distribution of the 40 million shares of Motors Common and, of course, will be further injured by the distribution of the remaining 23 million. In *United Funds* v. *Carter*, *supra*, p. 94, 291, the court held that the loss of a stock exchange listing, although it would not necessarily interfere with the continued growth and prosperity of the company on a long-term basis, granted an injunction stating: *"The damages to complainants are substantial but not susceptible of pecuniary evaluement."* (Italics ours.) The virtually unlimited powers of a court of equity to prescribe remedies to fit the complex relations of parties are set forth in *Hecht Co.* v *Bowles*, 321 U. S. 321, 329-330; McClintock, Equity (2d ed. 1948), Sec. 30, and Pomeroy, Equity Jurisprudence (5th ed. 1941), Sec. 109.

We submit the injury and inherent injustice to the Preferred can only be prevented by a mandate of this Court directing that the Preferred be called by du Pont at their call prices[39] or a judgment restraining any further distribution while the Preferred is outstanding pending the formulation of a plan consonant with equitable principles.

POINT SIX

The Distribution was actuated solely by the self-interest of the Dominant Group.

The Dominant Group claimed it relied upon three sources of advice in its determination to divest by Distribution. First was the advice of Smerling that the AAA

39. For the 3.50 Preferred $103 per share and for the 4.50 Preferred $120 per share. These call prices are as of the date of the announcement of the Distribution. The 3.50 Preferred has subsequently been reduced on April 20, 1964 to $102 per share, and is it present call price (A20-21, 49-50; Comp. Ex. B).

rating of the Preferred would be continued after the Distribution but du Pont did not obtain his opinion as to the effect of the Distribution upon the investment value of the Preferred. Du Pont has admitted these ratings are necessarily a matter of judgment,[40] some of which have been revised upwards and downwards in the light of changing circumstances, and that companies considered of high investment quality had subsequently defaulted in the payment of dividends or gone into bankruptcy (A78-81, 120).

Second was the opinion of Petito[41] that the Preferred would continue, after the Distribution, to be considered of top investment quality based essentially on his comparison of the Preferred with the 29 Preferreds and the Average Indices. We have already shown that the Preferred has been drastically downgraded by the comparison with the 29 Preferreds considered by Petito (A121-124). In addition, the charts and tables comparing the Preferred with the Average Indices, submitted by Petito in support of his evaluation of the Preferred after the Distribution, are misleading and without validity because

40. The defaulted bonds of the Calumet Skyway were not rated because the leading rating experts of Standard including Smerling could not "reach an agreement as to the classification." (The New York Times, July 7, 1963, F. 10). The preferred stocks of American Radiator, Liggett & Myers, W. T. Grant and Montgomery Ward, all included in the Average Indices, are rated "high grade" by Moody's whereas Standard's rates Montgomery Ward BBB (medium grade) and the other 3 companies A (sound). Standard's rating for high grade is AA (Standard's Stock Guide 1962).

41. Morgan, of which Petito is a partner, were the investment bankers for du Pont who sold to the public the $120 Million of Preferred on Prospectuses which gave prominence to the 60 million shares of Motors Common (A45; Ex. B, pp. 49-51; Ex. F). Morgan thereby availed itself of the sales appeal of this investment to enable it to sell the Preferred on favorable terms. Morgan effected the three secondary distributions for Christiana and the Family of Motors Common (A81-82). The Family as a result of the Distribution will have to sell about 20 million shares of Motors Common through secondary distributions by investment bankers (A56-58).

there is no basis for comparison.[42] The Preferred, according to Pippin, was overpriced by almost 10% (A104); Petito's charts covered a period prior to Distribution and, therefore, do not reflect the effect of the Distribution; the charts show marked peaks and valleys in the price of the Preferred showing the distortions in its prices, whereas the Average Indices were relatively stable (A128, 130) and 16 of the 23 preferreds in the Average Indices were rated lower than AAA.

Third was the Pippin Report (A96-119) setting forth his reasons allegedly justifying the Distribution,[43] which, we submit, establishes that he and the Dominant Group equated the interest of the du Pont Common holders and the Family with the interest of the Company. Pippin contended that du Pont's efforts to obtain the Preferential Tax Law produced a record both in and out of Congress which constituted, "quite much of a commitment that, given the remedial legislation the Company would distribute its entire 63MM GM shares to the stockholders" (A97). The United States Senate Finance Committee Report[44] on the tax law, issued before the Pippin Report, unequivocally negatives this contention stating:

> "Your committee wishes to make it very clear that it expresses no opinion as to what particular method

42. Petito's comparison recalls that the du Pont brief in this Court, when the Government tried by statistical averages to minimize the tax consequences of divestiture upon du Pont Common holders, stated: "It is always easier to be cheerful or indifferent about injustice or injury inflicted upon others if their individuality and necessities as human beings can be buried in a statistical 'average.'" (Ex. P, p. 381).

43. Pippin is an officer and salaried employee of du Pont, participated in the bonus plans, is eligible for stock options and, upon reaching retirement age, to participate in the du Pont Pension Plan. Pippin owns 1,200 shares of du Pont Common but no Preferred (A83).

44. United States Senate, Committee on Finance, Report on Distributions of Stock Pursuant to Orders Enforcing the Anti-Trust Laws, 87th Congress, 1st Session, Sept. 21, 1961 (Report No. 1100).

of divestiture of General Motors stock by Du Pont or by Christiana is appropriate." (Ex. S, p. 5)[45]

The Board or Dominant Group could not commit away the rights of the Preferred and thereby absolve itself from its fiduciary duty. The Divestiture Decree did not recognize any such commitment for it gave du Pont the power to select any phase of the Flexible Plan (Comp. Ex. C). If du Pont believed that such a commitment had been made, it could not properly fulfill its fiduciary duty to the Preferred.

Pippin virtually admitted there was a moral obligation in the interest of "fair play" to provide the Preferred some opportunity to avoid the "adverse impact" of the Distribution upon the Preferred's investment position but argued that no injury was done since the coverage of the Preferred after the Distribution would be in excess of the coverage when the Preferred was sold to the public (A98-101).[46] We submit that the disclosures in the Prospectuses of the coverage was not a representation of the limit of the cushion for the Preferred, since buyers of senior securities expect that the Company may prosper and the coverage increase. Furthermore, the Preferred had not agreed to countenance violations of fiduciary duties involving the assets of the Company because the coverage of their stocks had not decreased since the time of purchase.

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45. Robert H. Knight, General Counsel, Treasury Department, stated before the Senate Committee that the Treasury did not ask for nor did du Pont offer any commitments on any phase of the divestiture and a Senator suggested, "Congress would be in a peculiar position of trying to enforce a commitment, if it had one." (Ex. Q, pp. 36, 43).

Similarly, a letter to one of the petitioners from the Chairman of the House Committee on Ways and Means, dated August 31, 1961, makes it clear: "Should a bill dealing with this matter become law, it would have no effect if the preferred stockholders are in a position to take legal action to prevent the distribution of these assets to common stockholders." (Ex. AA).

46. We have already shown that the net working capital per share of the Preferred declined since the sale although the fixed assets increased and consequently, the effective coverage was reduced.

The Report in order to establish the alleged fairness of the Dominant Group asserted the claim, in the lower courts, that the Family made a pecuniary sacrifice in favor of the public du Pont Common holders by not offering exchanges of Motors Common for the Preferred. Such exchanges, it was claimed, would have resulted in a net savings of 25¢ per share to the long-term du Pont Common holders, which encompassed the Family, with a cost to short-term public holders of 65¢ per share.[47] However, it is admitted such exchanges would have cost Christiana, of which the Family owns 70%, an estimated 37¢ per share (A57, 115). Furthermore, Pippin's analysis, consisting of three printed pages and a chart, is predicated on the purest conjecture including (a) his estimate that the Preferreds were over-priced in the market by nearly 10%; (b) assumption of exchanges of 3 million Motors Common on the basis of the call price of the Preferred, although du Pont told this Court that there was "no assurance that even a single share of General Motors stock could be divested by such exchanges;" and (c) his assumption that the same percentage of both classes of Preferred would accept the exchanges (A103-107; A115; Ex. P, p. 395). The alleged savings to the Family of 25¢ per share, a total of $1.5 Million, is so conjectural and insignificant with respect to the market price of $250 per share for the du Pont Common as to negative any claim of a "sacrifice"

47. Before the Trial Court, in an attempt to justify its position of fairness du Pont contended that a tax sacrifice was made by the Family in urging the new tax law since Christiana would be subject to an increased dividend tax on the Motors Common distributed to it because the base was increased from its cost to market value. The Senate Report rejected this contention (Ex. S, p. 5). Similarly, du Pont contended that the Family was subordinating their interest to the public Common holders because under the new tax law, the Family would be required to pay a capital gains tax immediately upon the Distribution. Various Congressmen and the Department of Justice rejected this contention (Ex. Q, p. 20). Upon proof by petitioners that these contentions were wholly without merit, du Pont abandoned them in the Court of Appeals.

by the Family.[48] It is clear that exchanges were not offered for they would markedly reduce the number of Motors Common which the Family could withdraw from du Pont on a capital gains basis and would reduce the Family's savings on the Distribution by $9 Million if 3 Million shares were exchanged. (A18, 23-24)

The Report is more persuasive by its omissions than by its inclusions. Pippin does not state that the dividends of $10 Million annually on the Preferred are non-tax deductible and, therefore, the dividend rates on the 4.50 Preferred and 3.50 Preferred are the equivalent of an interest rate before taxes of 9% and 7% respectively (Ex. G, p. 35) and that the Amicus recommended that fairness required the retention of 13 million shares of Motors Common to maintain the market value and high rating of the Preferred (Ex. N, pp. 112-114). Pippin offered no substantiation for his bare conclusion that du Pont will not require the proceeds of the sale of any shares of Motors Common for any future needs of the Company.[49]

It is manifest that the intent and purpose of all the activities of the Company in connection with the tax legislation and discretionary Divestiture Decree were to benefit the Common holders and the Family. Pippin admitted that extensive studies indicated a substantial part of the 63 million shares could be divested by methods other than Distribution, yet he stated (A96):

> "However, efforts to obtain remedial tax legislation proved to be successful, and the provisions of this new legislation (Public Law 87-403) which

48. By comparison du Pont stated to the Congressional Committee that $30 Million in taxes was not significant in the divestiture picture (Ex. Q, p. 83).

49. In contrast to Pippin's position, General Motors in a statement submitted to the House Committee on August 24, 1961 indicated its own possible need for future equity financing although its Balance Sheet as at December 31, 1961 shows cash of $404 Million; Government and other short-term marketable securities of $1.291 Billion, and total working capital of $3 Billion (Ex. P, p. 111; Ex. H, pp. 32-33).

became effective February 2, 1962, together with the provisions of the judgment recently entered by the District Court, make it practicable and desirable for the Company to divest all of its GM stock via distributions to stockholders."

Pippin rejected every possible method of divestiture which would have deprived the Dominant Group of any of the Motors Common. Although the Family had the right to take any steps that were to their advantage, they were under a duty to first remove the conflict which they created with the Preferred.

POINT SEVEN

The Distribution constituted a voluntary liquidation under the terms of the Preferred contract. The Preferred holders are entitled to the liquidating value of their securities.

We submit that the Distribution constituted a voluntary liquidation of du Pont within the terms of the Preferred contract.[50] This Distribution represents 65% including Motors Common at market and 41% at book value of the net worth of du Pont. In 1961, the dividend income after taxes from the Motors Common was $145 Million as compared with the net income of $273 Million from the du Pont commercial operations. By reason of its ownership of 22% of Motors Common outstanding, du Pont's proportionate interest in Motors sales was $2.6 Billion and exceeded by 20% du Pont's own total sales of $2.2 Billion. Its share of Motors net profits was about $207 Million (Ex. G, p. 34; Ex. H, p. 30). Du Pont has always contended in the courts and before the Congressional Committees that its Motors Common was exclusively a long-term investment in a business that was completely different from its own and provided diversification to all

50. In the event of any liquidation, the 4.50 Preferred is entitled to $100 or $115 per share if the proceeding is involuntary or voluntary respectively; and the 3.50 Preferred is entitled to $100 or $107 per share (A49-50).

du Pont holders, and as stated by Pippin, "separate and distinct from the company's commercial activities," (109-110; Ex. Q., p. 75).[51] The Distribution is, therefore, a complete termination of the investment business of the Company, and is as much a liquidation of du Pont as if it had liquidated its chemical business and retained the investment end.[52]

Respondent contended that the issue with respect to "liquidation" is whether the Distribution of the Motors Common "concededly" to be made out of surplus, can be said to be a step in the direction of terminating the other business activities of du Pont (Resp. Br. C.A. p. 31). First, the Distribution is not being made out of earned surplus but is being made from the capital paid-in to du Pont which was credited to paid-in surplus (capital

51. In the resolution dated May 31, 1962, authorizing the distribution, the Board stated: "Whereas, for more than 40 years this Company has treated its block of General Motors common stock as an investment * * *." (Ex. M)

52. The treatment, accounting-wise by du Pont, in its report to stockholders, of the distribution of the 23 million shares of Motors Common on July 9, 1962 fortifies the conclusion that a liquidation was effected. The aggregate cost of $21,693,000 of these shares to du Pont was not charged to earned surplus but was charged, in accordance with the Distribution Resolution, to paid-in surplus, and the remainder of the book value of these charges was charged to a special surplus account (Ex. I; Ex. M, pp. 4-5). Paid-in surplus represents capital contributions in excess of the par value of the capital stock issued for cash or in exchange for property. It does not represent earnings but is paid-in capital. A charge to the paid-in surplus when the Company has adequate earned surplus, as is the case with du Pont, represents a return of capital. This is the inference of a du Pont letter to a stockholder in which it is stated that, from the standpoint of the Preferred contract, "the distribution would be made from undistributed earnings, and would not constitute a liquidation, dissolution or winding up of the Company." (Ex. FF" 19a). Actually, du Pont made the distribution from paid-in surplus representing capital contributed and, thereby, treated it as a liquidating dividend.

surplus).[53] Second, the du Pont charter provides: "In the event of *any* liquidation or dissolution or winding up of the corporation whether voluntary or involuntary," the Preferred shall be entitled to the liquidating value (A50) (emphasis supplied). According to the New Century Dictionary, "*any*" is defined to include: "in any degree; to any extent; at all." A complete cessation of all business activities of du Pont is not the *sine qua non* of "any liquidation."[54]

POINT EIGHT

The decisions of the Courts below were erroneous.

The instant action was tried upon a joint stipulation of facts and exhibits. No witnesses were called and no oral testimony taken. This Court is free, therefore, to make its own Findings of Fact and Conclusions of Law. *Schenker* v. *du Pont*, 329 F. 2d 77, 78, C.A. 2d 1964; *Goldberg* v. *P. & L. Equipment Co.*, 311 F. 2d 883, C.A. 5th 1963; *Pflugradt* v. *United States*, 310 F. 2d 412, 415 (1962).

The discussion by the Court of Appeals of the Board's duties, the fulfilment of its obligations and the denial of injury to the Preferred is confined to one paragraph of the opinion. The Court by-passes petitioner's exposition that the obligations and duties of the Board and Dominant Group are encompassed in three categories: the divestiture was not the result of a voluntary business judgment but was forced and, therefore, imposed upon the Board and Dominant Group stringent equitable obligations in formulating a plan under the Divestiture Decree; their

53. As stated in the report of Arthur Andersen & Co., independent accountants for du Pont, accompanying the financial statements included in the 1947 Prospectus: "These transactions (entries in paid-in surplus account) are clearly of a capital nature and accordingly in our opinion are proper paid-in surplus items" (Ex. F, p. 32).

54. Carpenter, in a letter to a Preferred holder, wrote: "There is no doubt that the divestiture of the GM investment will, in effect, be a 'partial and involuntary liquidation of some of the Company's assets.'" (Ex. FF, 4-a)

general fiduciary duties as directors and controlling stockholders, particularly in view of their conflicting position; and the obligations of equity and good conscience imposed upon them by reason of their various acts of commission and omission. The opinion of the Court of Appeals except for a general statement that the Board observed its fiduciary duty does not discuss any of these fiduciary, equitable or contractual obligations; does not mention the irreconcilable conflict of interests between the Family and the Preferred; and completely disregards the obligations of the Dominant Group as controlling stockholders but merely mentions the duties of the directors. The opinion, therefore, disregards the most essential elements of petitioners' case.

The Court of Appeals adopted the Findings of Fact and the Conclusions of Law of the Trial Court. The Trial Court found, as a matter of law (A30):

> "The directors of du Pont, and the du Pont family, insofar as that family controls the policies of du Pont, owe a fiduciary duty to each class of du Pont shareholders. *Guth v. Loft, Inc.*, 23 Del. Ch. 255, 5 A. 2d 503 (Sup. Ct, 1939). Action of the directors in violation of this fiduciary duty is voidable in equity at the instance of a stockholder injured thereby irrespective of the propriety of the directors' action in other respects under the charter. *Zahn v. Transamerica Corp.*, 162 F. 2d 36 (3d Cir. 1947)."

However, the Trial Court immediately removed the Family from the onus of the divestiture decision and the umbra of fiduciary duties by holding that the Family did not control the Distribution decision (A12):

> "While it can be reasonably deduced from the facts submitted that du Pont management is influenced or controlled by the du Pont family, there is a lack of persuasive evidence that such influence or control was causally related to any management policy or decisions which are the basis for plaintiffs' claims in this action."

The control and influence of the Family over the Board and management from the inception of du Pont, together with the immense stake it had in the decision as to the method of divestiture, were of such potency as to negate completely any contention that the Family did not exercise this power, or that the Board which adopted the Distribution Resolution and were du Pont Common holders and, therefore, knew the benefits of Distribution to the Family, would require express instructions to induce favorable action by them. Almost a conclusive presumption exists that such control was exercised, and there is no evidence rebutting this presumption.[55]

The opinions of the Court of Appeals and the District Court accept as fact the lip service paid by the directors and controlling stockholders to their fiduciary duty although du Pont persisted in the courts below that they owed no fiduciary duty to the Preferred holders under their contract but owed a duty to the minority Common holders and they, therefore, could distribute the Motors Common regardless of their motives or damage to the Preferred (pp. 18-21 this petition). The Court of Appeals

55. The answer to this claim of non-exercise of the power was stated in this Court's opinion (353 U. S. 586 at p. 603): "We are not required to assume, contrary to all human experience, that du Pont's shareholders will not vote in their own self-interest." *U. S. v. E. I. du Pont*, 366 U. S. 316 at 332, cited *North American Co. v. S.E.C.*, 327 U. S. 686, where this Court stated (p. 693):

> "Historical ties and associations, combined with strategic holdings of stock, can on occasion serve as a potent substitute for the more obvious modes of control. See *Southern Pacific Co. v. Bogert*, 250 U. S. 483, 491-492; *Natural Gas Co. v. Slattery*, 302 U. S. 300, 307-308. Domination may spring as readily from subtle or unexercised power as from arbitrary imposition of command. To conclude otherwise is to ignore the realities of intercorporate relationships. *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 145-146."

In the case at bar, *a fortiori*, the exercise of this influence must be presumed since the relationship is intracorporate and direct—10 members of the Family were members of the Board which made the decision to distribute and the Trial Court found the Family controlled the management.

stated that it recognized the Board had a fiduciary duty to the Preferred to accord them fair treatment but does not set forth the standards of "fair treatment" in the circumstances of the instant case nor does it explain how taking away the total asset and income coverage inherent in the Motors Common could possibly be "fair" to the Preferred. Both lower courts also concluded that the action of the Board, in view of the asset coverage still remaining, caused no injury to the Preferred but their opinions do not set forth the yardstick of what constitutes "injury". The Trial Court found that the Distribution of the Motors Common "will deprive the preferred of certain desirable security * * *." If deprivation of asset and income coverage can cause injury, then no greater injury could have been done to the Preferred than by the Distribution method. We submit that the Preferred without the liquid asset of $3.15 Billion of Motors Common is not the same Preferred as with the Motors Common. The conclusions of the courts below as to the injury were in direct conflict with the comparisons of the Preferred with the 48 Preferreds of other industrial companies which show the Preferred has been materially downgraded.

The Trial Court's conclusion was adopted by the Court of Appeals that the directors and Dominant Group were not disqualified from acting on the method of divestiture even though it was evident from the record that a conflict of interest existed which was created by them, and the vast economic interest of the Family was involved. We submit, as has been shown, that this is directly contra to the adjudicated cases. See *Zahn* v. *Transamerica, supra; Pittsburgh, C., C. & St. L. Ry. Co.* v. *Dodd, supra; Michoud* v. *Girod, supra.*

The Trial Court accepted as proof of the good faith and fairness of the Family their claim that they made a tax sacrifice in connection with their sponsorship of the Preferential Tax Law because that law increased the cost base of the Motors Common distributed to Christiana. However, other provisions under the Preferential Tax Law

compensated for this increase.[56] In the face of the unchallengeable evidence to the contrary, this claim of sacrifice was abandoned by respondent in the Court of Appeals. Similarly, respondent asserted the claim accepted by the Trial Court that the Family was subordinating their interests to the public Common holders under the new tax law because they, as long-term holders of the du Pont Common were subject to an immediate capital gains tax on the Distribution whereas the public short-term holders were not. This argument was rejected as having no merit by various members of the Senate Committee, the Treasury Department and the Department of Justice. (Ex. Q, P. 20) Respondent also abandoned this contention in the Court of Appeals. We have already discussed at length that du Pont's conclusion accepted by the Trial Court that it made a sacrifice by not offering Motors Common in exchange for the Preferred was predicated upon a series of hypotheses and conjectures which were futile and, more vitally, had the exchanges of 3 million shares of Motor Common been effected as assumed by respondent, the savings in taxes by the Family on the Distribution would have been reduced by $9 Million.

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56. The Senate Finance Committee Report on the tax legislation justified the change in the cost base to Christiana stating (Ex. S, p. 5):

> "Your committee believes that this is justified by the fact that Christiana's individual shareholders will receive the special 'return of capital' treatment provided for in the bill, if Christiana should be ordered to distribute to them the stock received by it. * * *"

The Senate Minority Report stated that the Christiana stockholders received the "most favored tax treatment (Ex. S, p. 16).

Du Pont stated in the Senate Hearings that, under the new law, including the increase in Christiana taxes, the aggregate tax would be about $200 Million which is about the amount that du Pont urged in this Court would be the tax under the prior law. As contrasted with this claim of an alleged increase in taxes, the new law reduced the overall taxes on the Distribution by between $575 Million and $825 Million to the non-corporate du Pont Common holders (Ex. Q, p. 77).

The District Court found, and the Court of Appeals accepted the conclusion, that the mandate of the Supreme Court remanding the case to the District Court gave du Pont the right to divest itself of all its Motors Common in such manner and by such means as it might elect (A10, 11). The fact is the mandate and the Divestiture Opinion of this Court did not give this power to du Pont but directed that a judgment be entered against du Pont requiring it to divest itself of all its Motors Common.

Reasons for Granting the Writ

The instant cause of action arises out of the mandate of this Court issued in *U. S.* v. *E. I. du Pont*, 366 U. S. 316 (May 22, 1961), directing du Pont to divest itself of all its Motors Common as being in violation of the Clayton Act, Sec. 7. The decree of the District Court entered on such mandate provided (Comp. Ex. C, p. 12 et seq.):

"VIII

A. Du Pont shall divest itself of all of the General Motors stock specified and itemized in Paragraph B of this Article VIII by distributing such stock to its stockholders (including non-*pro rata* distributions in redemption of its own stock), or, in the alternative, by disposing of all such stock by such methods or combination of methods as it may select, * * *."

The Board and the Family selected Distribution as the sole method of divestiture.

In *Brown Shoe Co.* v. *United States*, 370 U. S. 294, this Court held a decree requiring full divestiture and ordering a proposal in the immediate future of a plan for carrying into effect the Court's order of divestiture was held to be a final judgment within the meaning of Sec. 2 of the Expediting Act, and that this Court had jurisdiction of a direct appeal in the action. This Court stated that in the case of such decree the main issue of divestiture had been adjudicated and reviewed leaving the details of the relief order to be formulated which, in the usual case, are sub-

mitted to the District Court for approval and entry. This order is also subject to the review by this Court. In the case at bar, however, the power to formulate the plan of divestiture was delegated to du Pont under the discretionary provisions of the Divestiture Decree without any requirement that such plan be submitted to the District Court for approval.

In the Divestiture Opinion, this Court held that it had a general duty to examine a District Court's decree closely to satisfy itself that the relief is effective to redress the anti-trust violation proved. In addition, this Court held the decree appealed from was fashioned in obedience to the judgment of this Court sent down to the District Court after its reversal of the dismissal of the Government's complaint against du Pont which was an additional ground for using its plenary power to determine whether the decree entered pursuant to the mandate effectively implemented the opinion of this Court.

It is important that a review of all the relevant aspects of the plan of divestiture solely by Distribution formulated by du Pont be made by this Court. The judgment in the instant case, although not a final decree in the du Pont anti-trust suit, is so closely related to the final disposition of that proceeding and the mandate of this Court as to make it incumbent upon this Court to satisfy itself that equitable considerations attendant on the formulation of such a plan were strictly observed for the protection of the entire community of interests in du Pont including the senior security holders.

This Court should determine whether the discretionary power to formulate the details of the plan of divestiture, delegated to du Pont by the decree in the equity action, imposed on the Board and the Dominant Group obligations of a court of equity to propound a plan which was fair to the Preferred holders. Similarly, this Court should determine whether the Board and Dominant Group in formulating the plan were subject to the general fiduciary

duties of directors and controlling stockholders not to aggrandize their pecuniary interests to the detriment of the senior securities with whom their interests conflicted. A determination by this Court is also required of the equitable and legal obligations imposed upon the Board and Dominant Group to treat the Preferred holders fairly by reason of their various acts of commission and omission relating to the sale of the Preferred to the public and in connection with the divestiture litigation and Preferential Tax Law.

We submit that a review by this Court is essential to ascertain whether the divestiture plan, promulgated by du Pont, to divest solely by Distribution complied with the equitable principles of inherent fairness and fair play, good faith and diligence imposed by the Clayton Act, the mandate of this Court, the Divestiture Decree, the general fiduciary duties of the Board and Dominant Group and the legal and equitable obligations resulting from the various acts of the Board and Dominant Group.

As far as petitioners know, this is the first case involving divestitures encompassed by the provisions of Public Law 87-403, the Preferential Tax Law, which permits distributions to non-corporate stockholders, pursuant to anti-trust decrees, on a capital gains basis instead of at normal income tax rates. The resultant tax savings, which are dependent upon the method of divestiture adopted, are of such magnitude as to act as a compelling force on controlling stockholders to select a plan of divestiture that may disregard the interests of senior security holders and creditors.[57] This Court should consider all the facts in

57. The Department of Justice at the Congressional hearings on the tax bill stated: "we would not want to create the situation in which people felt that divestiture was a nice thing to happen to them" (Ex. P, p. 48).

See the Department of Justice Antitrust Division statement to the effect that the decision of this Court in the du Pont anti-trust case may result in many additional anti-trust suits (The New York Times, April 18, 1964, p. 35).

The Family is effecting a tax saving of $220 Million in taxes and other substantial benefits and all the Common holders including the

the instant case so that it may, if it considers it necessary, promulgate principles and procedures to be followed by courts, directors and controlling stockholders to insure the safeguarding the communities of interests in conformity with the intent of its mandates in divestiture suits.

This Court or the District Court, in evaluating or propounding a plan of divestiture, would be duty-bound to consider the fairness of the plan without regard to any claims of limitations on the rights of stockholders prescribed by private contract or state law. The Board and Dominant Group undertook this same duty when they assumed the power to devise the plan of divestiture. However, respondent concluded that the Preferred was absolutely bound by its contract and the corporate laws of Delaware; had no rights or interest in any of the Motor Common; that the Board and Dominant Group had the absolute power under law to distribute the Motors Common regardless of their motives or its effect on the Preferred; and that they owed a fiduciary duty only to the minority Common holders with respect to this stock and none to the Preferred.

A vital question is the appropriateness of the Board and Dominant Group, with their marked conflict of interests with the 22,000 owners of the $238 Million of Preferred, assuming the discetionary power under the Divestiture Decree to formulate the plan of divestiture, particularly since the conflict was created as a result of their acts. A court with any conflict of interest would disqualify itself from formulating a plan and the Board

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Family are saving $575 Million to $825 Million in taxes in withdrawing 68% of their investment by the adoption of Distribution as the method of divestiture. The ability to effect this withdrawal and tax saving, we submit, is the proximate cause of the injury to the Preferred. The Distribution reduced the asset coverage of the Preferred by $3.15 Billion or 65% (the present market value of Motors Common is about $5.5 Billion) and the income coverage by $147 Million annually or 35%. Other methods of divestiture were available that were not harmful to the Preferred which du Pont had stated it would use if Congress did not pass the tax legislation.

and Dominant Group should not have proposed nor assumed this duty unless the conflict with the Preferred was first eliminated.

Finally, the disposition of the 63 million shares of Motors Common representing a 22% interest in the assets and operations of that Company, owned as an investment by du Pont for 45 years, constituted a complete liquidation of du Pont's investment business. We submit that the inclusion in the charter of the word "any" in juxtaposition to "liquidation" connotes that the liquidation of the Company does not have to be complete under Article Fourth, Section V of the Preferred contract, and that the accounting treatment by the Company of the Distribution indicates that a liquidation was intended.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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SCHEDULE A

Comparison of Financial Characteristics of du Pont Preferred with the 29 Preferreds Considered by Petito

Page Number in Moody's 1962 Volume	Company	Per Share of Preferred: Net Tangible Assets (b)	Net Cash Assets (b)	Earned (c)	% Preferred to Total Capitalization
1267	DU PONT COMPANY (Rated AAA)				
	INCLUDING MOTORS COMMON AT MARKET	$ 2,021	$ 1,623	$ 175	4.9
	EXCLUDING MOTORS COMMON	$ 703	$ 304	$ 114	13.9
	PREFERREDS (Rated AAA)				
1017	Eastman Kodak	$ 8,183	$ 4,095	$ 1,377	.6
1875	U. S. Gypsum	2,024	1,367	469	2.5
2767	General Motors	2,069	789	314	4.5
1313	Merck & Co.	1,673	930	230	6.1
46	Sherwin Williams	1,335	842	124	7.5
2071	Ingersoll Rand	5,966	3,822	942	1.7
1946	Kellogg Co.	981	357	197	10.2
1471	Minneapolis Honeywell	908	378	100	8.3
910	Pillsbury Co.	2,525	837	222	3.1
1049	(a) Procter & Gamble	29,012	10,527	4,739	.3
2313	(a) Standard Oil of California	1,212	110	141	7.7
984	Corning Glass	2,683	917	479	3.7
901	General Mills	719	96	58	10.6
	PREFERREDS (Rated AA)				
1461	Hercules Powder—5% Pref.	2,437	509	320	4.5
1296	(a) American Can	1,240	—	109	5.4
1475	National Lead "A" Series	1,382	620	220	10.1
89	Quaker Oats	828	337	106	12.4
1504	(a) United Shoe Machinery	2,310	540	208	9.1
925	Anchor Hocking	1,867	972	178	5.7
2295	Armstrong Cork	1,105	285	114	9.3
1444	Borg Warner	3,630	1,957	247	3.8
2805	International Paper	5,051	1,237	420	2.0
	PREFERREDS (Rated A)				
1469	Liggett & Meyers	1,763	1,545	158	4.6
1789	American Radiator	6,306	3,036	317	1.5
2309	American Tobacco	1,076	928	130	7.9
479	International Harvester	1,261	608	59	7.0
2664	U. S. Steel	917	—	52	8.6
1030	W. T. Grant	926	542	55	8.6
	PREFERRED (Rated BBB)				
1000	Montgomery Ward "A" Series	3,152	2,267	76	3.2

Cents omitted.

All figures were taken from Moody's 1962 Volume or derived therefrom and include financial data for the calendar year 1961 or fiscal years ending in 1961.

(a) Preferred stocks having no par value or par and stated values of less than $100 per share. Figures for these companies were adjusted to reflect a $100 basis for the stock.

(b) After deducting all liabilities including long-term debt.

(c) After deducting all expenses including interest on long-term debt.

SCHEDULE B

Comparison of Financial Characteristics of du Pont Preferred with the Remaining 19 Preferreds Rated AA.

Page Number in Moody's 1962 Volume	Company	Per Share of Preferred: Net Tangible Assets (b)	Net Cash Assets (b)	Earned (c)	% Preferred to Total Capitalization
1267	DU PONT COMPANY (Rated AAA)				
	INCLUDING MOTORS COMMON	$ 2,021	$ 1,623	$ 175	4.9
	EXCLUDING MOTORS COMMON	703	304	114	13.9
561	Allis-Chalmers Corp.	35,460	1,786	59	2.22
1513	Atlantic Refining Co.	1,620	—	131	4.53
2449	Beatrice Food Co.	1,403	161	136	7.35
1517	Bristol Meyers Co.	1,275	498	283	5.71
1877	(a) Colgate Palmolive Peet Co.	1,753	642	178	4.63
2546	Container Corp. of America	2,497	—	292	3.37
2041	(a) Continental Can Co.	3,482	—	270	2.06
2626	(a) Crown Zellerbach Co.	1,556	175	139	5.3
225	Dana Corp.	3,997	2,090	374	2.52
10	H. J. Heinz Co.	2,178	683	194	4.6
2788	Owens-Illinois Glass Co.	412	55	42	22.47
639	Pet Milk Co.	949	421	60	10.4
523	Reynolds Tobacco Co.	2,133	1,647	420	7.26
526	Rohn & Haas Co.	2,839	1,116	310	3.46
1485	(a) Scott Paper Co.	2,365	82	283	3.63
1498	(a) Standard Brands Inc.	803	294	93	9.82
102	Standard Oil Co. (Ohio)	1,688	263	141	5.16
106	Stauffer Chemical Co.	4,893	787	501	1.95
2607	West Virginia Pulp & Paper Co.	2,401	—	107	3.08

All figures were taken from Moody's 1962 Volume or derived therefrom and include financial data for the calendar year 1961 or fiscal years ending in 1961.

(a) Preferred stocks having no par value. Figures for these companies were adjusted to reflect a $100 basis for the stock.

(b) After deducting all liabilities including long-term debt.

(c) After deducting all expenses including interest on long-term debt.

APPENDIX A

Opinion of Court of Appeals

Before: SWAN, SMITH and MARSHALL, *Circuit Judges.*

SWAN, *Circuit Judge*:

This is an appeal from a judgment dismissing the complaint in an action brought by plaintiffs on behalf of preferred stockhloders of E. I. du Pont de Nemours & Company, Incorporated (hereafter called du Pont) seeking to set aside a plan of divestiture adopted by the du Pont board of directors on May 31, 1962 with respect to 63,000,000 shares of General Motors common stock owned by du Pont. The plan voted by the directors provided for an initial distribution of 23,000,000 shares on July 9, 1962 and distribution of the remaining 40,000,000 shares by February 1965, to holders of the du Pont common stock.[1] This disposition of its investment in General Motors stock will leave du Pont with unimpaired capital, with a surplus of more than one billion dollars, and with no change in the commercial activities which constitute its main business.

Shortly after announcement of the plan, plaintiffs brought the present suit to protect the interests of du Pont preferred shareholders. There are two series of preferred stock. The first series, issued in 1937 and 1939, with an annual dividend of $4.50 per share consists of 1,688,500 shares. The second series, issued in 1947, consists of 700,000 shares with a $3.50 dividend. In each series the shares have a stated value of $100 each. They are not entitled to vote, except on limited conditions, but

1. In *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586 (June 3, 1957) the Court held that defendant violated §7 of the Clayton Act by ownership of General Motors common stock and remanded the cause to the United States District Court for the Northern District of Illinois, to determine the relief appropriate "to eliminate the effects of the acquisition offensive to the statute." From the decree entered on remand the United States appealed. The Court then directed complete divestiture and required du Pont to file a proposed judgment providing for complete divestiture within 10 years. *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U. S. 316, 330.

are entitled to receive cumulative dividends before any dividend can be paid on du Pont common stock. They are also entitled to payment of the stated value upon involuntary liquidation and to payment of the redemption value upon voluntary liquidation of the corporation. The redemption price is $120 per share for the 4.50 series, and $103 per share for the 3.50 series. Du Pont can call the preferred at these prices. Plaintiffs hold 1500 shares of the 3:50 series.[2]

They are residents of New York and the defendant is a Delaware corporation licensed to do business in New York. The complaint was filed on June 21, 1962. It alleged three causes of action: the first sought an injunction restraining du Pont from distributing the 63,000,000 shares of General Motors,[3] the second sought to compel du Pont to call or retire its preferred stock, and the third was a derivative suit against individual defendants, which was dismissed before trial for failure to serve the defendants. Du Pont filed its answer September 14, 1962. The case was tried November 30 on a joint stipulation of facts, and judgment dismissing the complaint was entered June 27, 1963.

The court below made forty-four findings of fact and ten conclusions of law. Since there was no oral testimony, the appellants contend that we are free to make our own findings of fact. So we are. However, a careful review of the record has not caused us to differ with any of the relevant findings made by Judge Palmieri. We also agree with his conclusions of law and the authorities cited to support them.

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2. Edward Schenker holds 1,000 shares, part of which he acquired in October 1957, about four months after the first Supreme Court decision of June 3, 1957.

David Schenker holds 500 shares, part of which he acquired in November 1960.

3. A motion for a temporary injunction was denied July 3, 1962. This was affirmed two days later. *Schenker* v. *du Pont*, 2 Cir., 304 F. 2d 880.

Appendix A

Nearly one half of appellants' brief is devoted to establishing that the directors of du Pont owe a fiduciary duty of fair treatment to holders of the preferred stock. This is conceded by the appellee and was recognized by the trial judge, as it is by us. The directors also owe a fiduciary duty of fair treatment to holders of du Pont common stock. Judge Palmieri found no breach of duty to either class of stockholders. We agree. The divestiture order required action by the directors. The action taken was a reasonable exercise of business judgment, and in view of the assets remaining to protect the preferred shareholders caused them no injury. At the end of 1961 du Pont's net assets other than its General Motors investment had a book value of 7.2 times the stated value of all outstanding preferred stock. At the end of 1947, when the last series of preferred was issued, net assets, including the General Motors stock, were only about 3.5 times the stated value of the preferred. The income figures are comparable. In 1947 total du Pont income was 10.8 times as great as the preferred dividend requirement; since 1954 du Pont income from sources other than the General Motors stock has never been less than 22.5 times the preferred dividend. In 1961 this income was 27 times the preferred requirements. And there was uncontradicted expert opinion that the preferred would still be rated as a triple A investment.

The final contention to be considered is that the distribution of the General Motors stock constitutes a voluntary liquidation within the meaning of the charter provision, Article Fourth, Section V: "In the event of *any* [italics added by appellants] liquidation or dissolution or winding up of the corporation, whether voluntary or involuntary," the holders of preferred shall be entitled to be paid the amounts fixed for the respective series before anything is paid to holders of common stock. The trial court held the plan of divestiture was not a "liquidation." We agree. It is obvious to us that "liquidation" or "dissolution" as used here must at least approximate a "winding-up" of the cor-

poration's main business. See *Lafayette Trust Co.* v. *Beggs*, 213 N. Y. 283-84, 107 N. E. 644; *Colorado ex rel. Fraser* v. *Great Western Sugar Co.*, 8 Cir., 29 F. 2d 810. This conclusion is fortified by Section IX of the charter which provides that "* * * the assets and funds of the corporation remaining, after the payments have been made to the holders of the preferred stock, as provided in Section V hereof, shall be divided and paid to the holders of the common stock according to their respective shares." This section makes even more certain the inference that a payment to the preferred under Section V was to be undertaken only in the context of a complete distribution of all corporate assets.

The judgment is affirmed.

APPENDIX B

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of March one thousand nine hundred and sixty-four.

Present: HON. THOMAS W. SWAN,
HON. J. JOSEPH SMITH,
HON. THURGOOD MARSHALL,
Circuit Judges.

EDWARD SCHENKER and DAVID SCHENKER, on behalf of themselves and all other Stockholders of the Cumulative Preferred Stock, etc., of E. I. duPont de Nemours & Company Inc.,

Plaintiffs-Appellants,

v.

E. I. DU PONT DE NEMOURS & COMPANY, INC.,
Defendant-Appellee,

WALTER S. CARPENTER, JR., et al.,
Defendants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk